TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 652

THE GREAT ATLANTIC & PACIFIC TEA COMPANY ET AL., APPELLANTS,

vs.

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS, STATE OF LOUISIANA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

FILED JANUARY 14, 1937.

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[fol. 1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

In Equity

No. 277

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, Plaintiff,

versus

ALICE LEE GROSJEAN, Supervisor of Public Accounts, and GASTON L. PORTERIE, Attorney General of the State of Louisiana, Defendants

ORIGINAL BILL OF COMPLAINT—Filed February 27, 1935

To the Honorable the United States District Court for the Eastern District of Louisiana:

The Great Atlantic & Pacific Tea Company, a corporation organized and existing under the laws of the State of Arizona and a citizen and resident of that State, suing on behalf of itself and all other persons, firms, corporations and associations similarly situated, brings this its Bill of Complaint against Alice Lee Grosjean, Supervisor of Public Accounts of the State of Louisiana, and Gaston L. Porterie, Attorney General of the State of Louisiana, and respectfully represents that:

I

Plaintiff, the Great Atlantic & Pacific Tea Company, is a corporation organized and existing under the laws of the State of Arizona and is a citizen of that State. Plaintiff has complied with all the laws of the State of Louisiana relating to foreign corporations and is authorized to do and is doing business in said State.

II

The defendant, Alice Lee Grosjean, is the duly elected, qualified and acting Supervisor of Public Accounts of the State of Louisiana and as such is charged by the Acts of

the Legislature of the State of Louisiana hereinafter referred to with the duty of collecting and of enforcing the collection of the taxes provided by Act 51 of the Legislature of Louisiana for the year 1934. The said defendant is [fol. 3] a citizen of the State of Louisiana and her official residence as Supervisor of Public Accounts of the State of Louisiana is at Baton Rouge in the Parish of East Baton Rouge within the jurisdiction of the United States District Court for the Eastern District of Louisiana.

III

The defendant, Gaston L. Porterie, is the duly elected, qualified and acting Attorney General of the State of Louisiana, charged by the Constitution and laws of said State with the duty, power and authority to institute and prosecute criminal proceedings for the violation of the laws of the State and the supervision and control of the various District Attorneys throughout the State of Louisiana who also have the power and authority to institute criminal proceedings for the violation of the statutes and laws of the State of Louisiana. The said Gaston L. Porterie is a citizen of the State of Louisiana and his official residence as Attorney General of the State of Louisiana is at New Orleans, La., within the jurisdiction of the United States District Court for the Eastern District of Louisiana.

IV

The amount in controversy in this case exceeds the sum or value of $3000.00 exclusive of interest and costs.

V

This is a suit of a civil nature in Equity and is brought for the purpose of enjoining the defendants from enforcing or attempting to enforce an Act of the Legislature of Louisiana known as Act No. 51 of the Legislature for the year 1934 entitled:

"An Act to amend and reenact the Title and Sections 1, 3, 5, 6 and 7 of Act 19 of 1932 entitled:

'An Act to levy an annual license tax on all persons, firms, partnerships, corporations or associations of persons engaged in the business of operating or maintaining two or more stores or mercantile establishments in this State where goods, wares, merchandise or commodities of every

description whatsoever are sold, or offered for sale at retail under the same general management, supervision, ownership or control, commonly known as branch or chain stores, under Section 8, Article X of the Constitution of 1921; and providing for penalties for the violation of this Act; and making an appropriation and distribution of said funds.' "

A copy of said Act is hereto attached and marked Exhibit "A". There is also attached hereto, marked Exhibit "B", a copy of Act 19 of the Legislature of Louisiana for the year 1932 which is the statute that Act 51 of the Legislature of Louisiana for the year 1934 purports to amend and re-enact.

[fol. 4]

VI

Plaintiff, for more than ten years continuously last past, has been engaged and is now engaged in the business of selling groceries, fruits, vegetables, poultry, meats, milk, butter, cheese, eggs and other foods, meats and dairy products or goods commonly sold in grocery and meat stores. A substantial portion of the above mentioned food-stuffs and merchandise is bought or purchased by plaintiff in other States of the United States and is shipped to plaintiff in the State of Louisiana and is sold by plaintiff at retail and, in many cases, in the original containers or packages. In the course of its business in Louisiana, plaintiff also purchases considerable quantities of food-stuffs and merchandise which it causes to be shipped into other States to be sold in such other States by plaintiff and the companies affiliated with it.

VII

Plaintiff, long prior to and at the time of the enactment of Act 51 of the Legislature of Louisiana for the year 1934, owned and operated a number of retail grocery stores in the State of Louisiana. During the year 1934, plaintiff operated stores at 107 locations in Louisiana of which 106 are now in operation, 62 of said stores are located in the City of New Orleans and 44 are located at points in Louisiana outside the City of New Orleans.

VIII

Plaintiff's capital invested in the State of Louisiana is approximately half a million dollars. Plaintiff has been

for many years last past and is now a taxpayer in the State of Louisiana, paying large sums for license; property and other taxes. The total taxes paid by plaintiff to the State of Louisiana and various sub-divisions thereof during the year 1934 are summarized as follows:

License or occupational taxes (exclusive of chain store taxes under Act 19 of 1932)	$9,867.60
Chain store tax under Act 19 of 1932	12,612.96
Ad valorem property taxes	8,337.50
Other taxes	870.27
Total taxes paid the State of Louisiana and various subdivisions thereof in 1934	$31,688.33

The foregoing is exclusive of the income tax imposed by Act 21 of the Legislature of Louisiana of 1934 which tax if due for the year 1934 would approximate $4000.00.

[fol. 5]

IX

Prior to the enactment of Act 51 of the Louisiana Legislature of 1934, the tax imposed by the State of Louisiana upon chain stores was that provided by Act 19 of the Louisiana Legislature of 1932. That Act applied to all those engaged in the business of operating two or more stores or mercantile establishments in the State of Louisiana where goods were sold at retail "under the same general management, supervision, ownership or control, commonly known as branch or chain stores". The said Act provided for a classification based upon the number of stores operated in Louisiana and established ten classes comprising units of 5 each and an eleventh class comprising all stores in excess of 50. The tax upon stores in the last class under said Act was $200.00 per store, stores falling within the lower classes paying at lower rates according to number of stores in each class, the said rates ranging from $15.00 to $100.00 per store for stores less than 50 in number. The taxes provided by said Act 19 of 1932 (a copy of which is hereto attached as Exhibit "B") are summarized as follows:

Bracket	Total Stores Operated in Louisiana	Tax per Store
1	2 to 5	$15.00
2	6 to 10	25.00

Bracket	Total Stores Operated in Louisiana	Tax per Store
3	11 to 15	30.00
4	16 to 20	40.00
5	21 to 25	50.00
6	26 to 30	60.00
7	31 to 35	70.00
8	36 to 40	80.00
9	41 to 45	90.00
10	46 to 50	100.00
11	Above 50	200.00

X

By Act 51 of 1934, the Legislature of the State of Louisiana undertook to amend and reenact Act 19 of 1932 and to fix the rate of tax to be paid by so-called chain stores by reference not to the number of stores operated by the owner in the State of Louisiana but by reference to the number of stores operated by the owner anywhere in the world. This provision is without precedent. The rates of tax established by Act 51 of 1934 (a copy of which is hereto attached as Exhibit "A") are summarized as follows:

[fol. 6]

Bracket	Total Stores Operated by Company	Tax on Louisiana Stores
1	Less than 10	$10.00 per store.
2	10 to 35	15.00 " "
3	36 to 50	20.00 " "
4	51 to 75	25.00 " "
5	76 to 100	30.00 " "
6	101 to 125	50.00 " "
7	126 to 150	100.00 " "
8	151 to 175	150.00 " "
9	176 to 200	200.00 " "
10	201 to 225	250.00 " "
11	226 to 250	300.00 " "
12	251 to 275	350.00 " "
13	276 to 300	400.00 " "
14	301 to 400	450.00 " "
15	401 to 500	500.00 " "
16	Over 500	550.00 " "

XI

The total number of stores operated in the world by plaintiff and other corporations "under the same general management, supervision, ownership or control" is 15,082 of which 14,600 are operated in the United States and 282 are operated in Canada. The effect of Act 51 of the Louisiana Legislature of 1934 is to increase the rate of tax imposed by the State of Louisiana upon plaintiff from a maximum of $200.00 per store under Act 19 of 1932 to a fixed sum of $550.00 per store. Under Act 19 of 1932, plaintiff paid $200.00 per store only upon stores in Louisiana in excess of 50 whereas under Act 51 of 1934, plaintiff is required to pay $550.00 per store upon every store in Louisiana. Under Act 19 of 1932, plaintiff was required to pay only upon a sliding scale ranging from $15.00 per store to $100.00 per store, as above set out in paragraph IX hereof, on stores in Louisiana less than 50 whereas under Act 51 of 1934, plaintiff is required to pay $550.00 upon each and every store in Louisiana. The total taxes payable by plaintiff to the State of Louisiana under Act 19 of 1932 upon 106 stores now in operation in Louisiana are $13,985.00 whereas under Act 51 of 1934 the total taxes payable to the State of Louisiana upon the same number of stores aggregate $58,300.00. While thus heavily increasing the rate of tax upon plaintiff's stores in Louisiana, Act 51 of the Louisiana Legislature of 1934 drastically reduces the rates of tax imposed upon other persons conducting in the State of Louisiana the same business as is conducted by plaintiff under the same conditions.

[fol. 7]

XII

Act 51 of the Louisiana Legislature of 1934 in effect and result undertakes to tax property outside the jurisdiction of the State of Louisiana by fixing the taxes on chain stores in the State of Louisiana by reference to the number of stores which the owner operates in the world. Taxation upon this basis under the Louisiana statute is applicable to every individual, person or corporation having only one retail place of business in the State of Louisiana if such individual, person or corporation has also retail places of business in other States or foreign countries, even though such individual, person or corporation has not more than one place of business in any other State or foreign country.

Under the Louisiana statute referred to, an individual, firm or corporation having only one retail place of business in the State of Louisiana is not subject to any tax under the statute but if said individual, firm or corporation then acquires and operates another store anywhere else in the world, he or it becomes subject to a tax imposed by the State of Louisiana. This result is equivalent to an undertaking by the State of Louisiana to tax the establishment and operation of a store in another state or foreign country since the tax results solely from the fact that a store is owned and operated outside the State. The Louisiana statute referred to repeats this process by increasing the rate of taxation upon individuals, firms or corporations operating a given number of stores in Louisiana, without any change whatsoever in the number of the stores operated within the State or the character of the business conducted by them within the State, solely by reference to the acquisition and operation of stores outside the State, thereby in effect subjecting to Louisiana taxation operations conducted entirely without the State which are properly subject to taxation only in the States or foreign countries where conducted.

Maintenance of the right of the State to impose taxes by reference to the number of stores operated outside its boundaries and anywhere else in the world is equivalent to maintaining the right of the State to tax capital invested, properly located and privileges exercised outside the borders of the State. A tax resting upon such a basis would be applicable to prevent the operation by any business of a branch in more than one State; this would result in the destruction of commerce among the States and permit each State to cut itself off from business relations with every other State, thereby making of itself an isolated economic [fol. 8] unit and converting the United States into a confederation of states. If a chain store tax in any State can be based upon the number of stores operated everywhere in the world, a sales tax in any State may also be based upon the amount of sales everywhere in the world, ad valorem property taxes in any State may be based upon the value of property owned everywhere in the world and franchise taxes in any State may be based upon total capital stock employed everywhere in the world. The recognition of such a basis for taxation by States would result in the destruction of the guarantee afforded by the Constitution

of the United States that no State may take property without due process of law by taxing a thing beyond its jurisdiction.

XIII

The operation of Act 51 of the Louisiana Legislature of 1934 not only extends beyond the borders and jurisdiction of the State of Louisiana but in its operation beyond such borders rests upon a purely arbitrary basis.

Under Act 51 of the Louisiana Legislature of 1934, the tax thereby imposed is fixed by reference to the stores operated outside the borders of the State of Louisiana and everywhere in the world under the same general management, supervision, ownership or control without regard to the character of the business conducted in such stores and even though each of such stores may be engaged in a character of business widely differing from that conducted by any of the other stores. Thus an individual operating one store in Louisiana and also one store in each of three other states or foreign countries, each of said stores being engaged in selling merchandise entirely dissimilar in character from that sold at any of the other stores and each being operated in different businesses and under widely differing conditions, would be subjected under Act 51 of the Louisiana Legislature of 1934 to the tax imposed by that statute upon the one store in Louisiana calculated by reference to the stores owned by the same individual and located in other states and foreign countries, although the existence of such other stores could have no possible bearing upon the operations or value of the business conducted by the owner in Louisiana.

Under the statute aforesaid, the tax imposed may be based upon the existence of another store anywhere in the world without reference to the location of said store, thereby giving the same effect for purposes of Louisiana taxation to the existence of another store at the other end of the earth as may be given to the existence of another store in a neighboring State; all stores outside the State [fol. 9] of Louisiana, no matter where located, are given like weight, regardless of their location or their connection with the Louisiana stores. The statute aforesaid proceeds upon the theory that every store in the world wherever located affords the same basis for additional taxation by Louisiana as any other store in the world, regardless of the locations of such store or stores. In giving the same effect

upon Louisiana taxation to an additional store located in Berlin, Germany as to a store in Mississippi and in proceeding upon the theory that every additional store outside Louisiana anywhere in the world gives an equal additional value to Louisiana stores without regard to the location of the store outside Louisiana or to the character of the business in which said store is engaged or to the connection of such store with stores in Louisiana, the Louisiana statute is especially arbitrary and without basis in reason.

XIV

Act 51 of the Louisiana Legislature of 1934 establishes an arbitrary discrimination between (a) those who operate a business in the State of Louisiana and also operate a business in other States and foreign countries and (b) those who operate a business only in the State of Louisiana, which discrimination seeks to penalize those who operate a business in other States and foreign countries as well as a business in Louisiana in favor of those who operate a business in Louisiana only.

Under the provisions of Act 51 of the Louisiana Legislature of 1934, an individual having 500 stores located in other States and foreign countries throughout the world and operating one store in the State of Louisiana would be required to pay a tax of $550.00 to the State of Louisiana upon that one store, while an individual operating one store in the State of Louisiana and not operating any stores outside that State would be required to pay no tax. No difference exists between the operations of these two stores in the State of Louisiana to justify any such difference in tax and the discrimination made by Act 51 of the Louisiana Legislature of 1934 is purely arbitrary. No basis is shown either in earnings on capital, capital invested, amount of sales or in any other respect which would justify the imposition of a tax of $550.00 upon the one store and no tax upon the other store and the statute in question, designed to accomplish and actually accomplishing this result, denies to plain-
[fol. 10] tiff and those similarly situated the equal protection of the law and takes their property without due process of law.

XV

The discrimination established by Act 51 of the Louisiana Legislature of 1934 between persons, firms or corporations, including chains, who operate solely in the State of Louis-

iana and persons, firms or corporations who operate also in other States and foreign countries, and the denial of equal protection of the laws thereby caused to plaintiff is disclosed by a comparison of the operation of the said Act upon plaintiff with its operation upon H. G. Hill Stores, Inc., a corporation organized under the laws of the State of Louisiana and operating a chain of grocery stores in said State in competition with plaintiff. The said corporation is engaged in the State of Louisiana in precisely the same character of business as plaintiff under the same conditions. The said corporation owns and operates in the State of Louisiana 87 stores, all of which are situated in the City of New Orleans and all of which are in immediate direct competition with the 62 stores operated by plaintiff in said City, many of the stores of said H. G. Hill Stores, Inc. being situated in the same square as stores owned and operated by plaintiff. Under Act 19 of the Louisiana Legislature of 1932, the said H. G. Hill Stores, Inc. was subjected to the same rate of tax as plaintiff, i. e., taxes ranging from $15.00 to $100.00 per store on stores under 50 in number and taxes of $200.00 per store on stores in excess of 50; but under Act 51 of the Louisiana Legislature of 1934, the taxes payable by the said H. G. Hill Stores, Inc. are drastically reduced and placed upon a sliding scale ranging from $10.00 per store to a maximum of $30.00 per store. A store owned and operated by H. G. Hill Stores, Inc. in the same block in the City of New Orleans as a store owned and operated by plaintiff under precisely the same conditions is required under Act 51 of 1934 to pay a tax of not more than $30.00 (which may be as little as $10.00) while the immediately adjoining store of plaintiff is required under the said Act to pay a tax of $550.00, or over 18 times as much as the maximum tax payable by a Hill store. The aggregate taxes payable by 87 stores operated in Louisiana by H. G. Hill Stores, Inc. under Act 19 of the Louisiana Legislature of 1932 would be $10,200.00 whereas under Act 51 of 1934 the aggregate taxes payable by H. G. Hill Stores, Inc. on said 87 stores would be $1,760.00. The tax payable by plaintiff on 87 stores in Louisiana under Act 51 of 1934 would be $47,850.00, or over 25 times as much as the tax of $1,760.00 [fol. 11] payable by H. G. Hill Stores, Inc. upon the same number of stores. Under the operation of the Louisiana statute referred to, H. G. Hill Stores, Inc. is permitted to classify its 87 stores in the City of New Orleans under five

separate classes, the first of which classes comprising 10 stores is subject to a tax of only $10.00 per store; the next class comprising 25 stores is subject to a tax of only $15.00 per store; the next class comprising 15 stores is subject to a tax of only $20.00 per store; the next class comprising 25 stores is subject to a tax of only $25.00 per store and the last class comprising stores in excess of 75 is subject to a tax of only $30.00 per store, while all of the plaintiff's 62 stores in the City of New Orleans are put in the maximum bracket under the Louisiana law and each of them is subjected to a tax of $550.00 per store.

Upon information and belief, plaintiff avers that H. G. Hill Stores, Inc. has assets approximating one million dollars ($1,000,000.00) all of which are invested in the State of Louisiana and said H. G. Hill Stores, Inc. has approximately twice the capital invested in the State of Louisiana that plaintiff has. There is no difference in the situation or operation of said H. G. Hill Stores, Inc. and plaintiff which would justify or support the imposition upon plaintiff of a tax 25 times greater than the tax imposed upon H. G. Hill Stores, Inc. for conducting the same business under the same conditions. Plaintiff enjoys no advantages over H. G. Hill Stores, Inc. which would support the discrimination established by Act 51 of 1934. On the contrary, the said H. G. Hill Stores, Inc. enjoys the advantage of local ownership and direct management and supervision. The said H. G. Hill Stores, Inc. does not operate under any greater expense than plaintiff; on the contrary, upon information and belief, plaintiff avers that it pays its employees higher wages than the said H. G. Hill Stores, Inc. pays to its employees and that plaintiff employs more persons in the State of Louisiana than does H. G. Hill Stores, Inc. Upon information and belief, plaintiff avers that the purchases of H. G. Hill Stores, Inc. in the local market are less than plaintiff's. The number of stores outside the State of Louisiana operated by plaintiff and other corporations under the same general management, supervision, ownership or control adds nothing to the value of the stores operated by plaintiff in the State of Louisiana as compared with the stores operated by H. G. Hill Stores, Inc. in said State. The increase in the size of a chain beyond a certain point has no tendency to increase the value of units in the chain. This has been recognized by States other than Louisiana which have enacted chain store tax statutes.

[fol. 12] Such statutes now exist in approximately 17 States and in no one of those States other than Louisiana does the maximum classification extend beyond 75 stores.

By establishing a differential of over $500.00 per store per year in the tax imposed upon plaintiff as compared with the tax imposed upon H. G. Hill Stores, Inc. and by subjecting plaintiff to a rate of taxation more than 25 times greater than the rate of tax imposed upon said H. G. Hill Stores, Inc. and by confiscating under the guise of taxation the greater part of plaintiff's possible profits while imposing upon the said H. G. Hill Stores, Inc., a chain of substantially the same size in Louisiana as plaintiff, only a tax equal to an insignificant percentage of its income and profits, the Louisiana statute referred to denies to plaintiff the equal protection of the laws and by its purely arbitrary operation takes plaintiff's property without due process of law.

XVI

The tax imposed by the statute in question upon plaintiff and others similarly situated is arbitrary, confiscatory and prohibitory. As applied to plaintiff's operations in the State of Louisiana during the year 1934, the tax would confiscate 75% of plaintiff's net profits while taxing other business of the same character as plaintiff's either nothing or an insignificant sum. By reason of its investment in the State in improvements, leaseholds, fixtures and other properties and the good will which plaintiff has built up by advertising and other expenditures, plaintiff cannot withdraw from business in the State without heavy loss. The tax imposed by the statute in question as applied to the plaintiff and others similarly situated in practical effect and operation is destructive of the property of plaintiff and takes the same without due process of law.

XVII

Act 51 of the Louisiana Legislature of 1934 is a tax measure and has nothing to do with the exercise of the police power of the State. It has no relation to the public health, the public morals, the public welfare or the public safety. No provision is contained in said Act for regulation, supervision or inspection. No standards are prescribed for the conduct of the business subject to said Act. The business of plaintiff does not increase fire hazards or require addi-

tional police protection or inspection and is not affected with a public interest and the statute in question has nothing to do with the exercise of the police power of the State [fol. 13] and cannot be sustained as a police measure. As a tax measure, its operation and effect is not equal or uniform and it is prohibitory, arbitrary and discriminatory as to plaintiff and other taxpayers similar situated.

XVIII

Act 51 of the Louisiana Legislature of 1934 violates the provisions of the Constitution of the United States, Amendment 14, Section 1, by depriving plaintiff of its property without due process of law and by denying plaintiff the equal protection of the laws in that, as appears from the preceding allegations of this Bill of Complaint:

(a) Said Act undertakes to tax property beyond the jurisdiction of the State;

(b) Said Act discriminates without justification between plaintiff and others operating a similar business under similar circumstances in the State of Louisiana by arbitrarily imposing upon plaintiff a tax more than 25 times greater than the tax imposed upon such others; and

(c) There is no basis for the classification fixed by said Act and said classification is unjust, oppressive, unreasonable, discriminatory and arbitrary.

For the reasons aforesaid, the said Act also violates the provisions of Article 1 of the Constitution of Lousiana of the year 1921 and particularly Sections 2 and 6 thereof.

Said statute also violates the provisions of Article I, Section 8, subdivision 3 of the Constitution of the United States by burdening, interfering with and regulating interstate and foreign trade and commerce.

XIX

Act 51 of the Louisiana Legislature of 1934 provides that the officer or manager of any corporation violating any of the provisions thereof shall be guilty of a misdemeanor and, upon conviction in a court of competent jurisdiction, shall be punished by fine of not more than $500.00 nor less than $50.00 or by imprisonment of not more than ninety days nor less than sixty days in the Parish Jail or both such

[fol. 14] fine and imprisonment at the discretion of the court. In addition the Act provides for civil penalties in the sum of 2% per month plus 10% additional on both principal and interest.

XX

Unless the defendants, after notice and hearing, are enjoined and restrained from enforcing or attempting to enforce the said Act, plaintiff will sustain irreparable loss and injury for which it has no plain, adequate and complete remedy at law in that plaintiff will be compelled to pay taxes pursuant to an invalid and unconstitutional enactment for which it is not legally liable and there is no provision in the law of Louisiana plainly and adequately authorizing or permitting the plaintiff to commence or prosecute any action at law in the Courts of the United States for the recovery of any tax paid by it under protest nor is any plain, adequate, complete provision made by any statute of the State of Louisiana for the payment or reimbursement to the plaintiff of any amounts which it might pay under said Act 51 of the Louisiana Legislature of 1934 upon a judicial determination that said Act is invalid. Plaintiff does business at over 20 points in the State of Louisiana and upon failure to pay the taxes imposed by Act 51 of 1934, it would be subject to numerous prosecutions and the possibility of numerous fines aggregating large amounts and its officers, agents and employees would likewise be subject to numerous prosecutions with the possibility of large fines and terms of imprisonment, and plaintiff's business and property in the State of Louisiana would be subjected to irreparable damage and injury. It is, therefore, essential, in order to permit plaintiff to escape irreparable injury and protect its constitutional rights that it obtain an injunction from this Honorable Court, restraining any attempt to enforce the said Act pending an opportunity to plaintiff to be heard upon the constitutionality of said Act and a final determination of the validity of said Act. It will not be practicable to hold a hearing on plaintiff's application for an interlocutory injunction and to reach a decision on said application before March 1, 1935, on which date the payment of the taxes provided by the Act aforesaid becomes due, and in order to protect plaintiff from irreparable damage and injury, a temporary restraining order should issue pending

the hearing upon plaintiff's application for an interlocutory injunction.

[fol. 15]

XXI

Plaintiff has heretofore offered to pay to the defendant, Alice Lee Grosjean, Supervisor of Public Accounts of the State of Louisiana, the amount of taxes which would be due by it under Act 19 of the Louisiana Legislature of 1932 if such payment would be accepted by said Supervisor in full settlement and satisfaction of all amounts due by plaintiff to the State of Louisiana as special licenses for the operation of plaintiff's stores in the State of Louisiana but said Supervisor has declined to accept such tender and insists upon the payment by plaintiff of the taxes imposed by Act 51 of the Louisiana Legislature of 1934 which plaintiff alleges to be unconstitutional, null and void.

XXII

The invalidity of Act 51 of the Legislature of Louisiana of 1934, which is the question involved in this litigation, is one of common or general interest to many persons, firms or corporations who operate one or more stores selling merchandise at retail in the State of Louisiana and also one or more stores situated at points in the world outside the State of Louisiana and such persons constitute a class so numerous as to make it impracticable to bring them all before the Court. This suit is, therefore, brought by plaintiff not only for itself but for all the members of the class.

Inasmuch, therefore, as plaintiff is without adequate remedy at law and can obtain relief only in a court of equity, plaintiff prays:

(1) That writs of subpoena be issued to each of said defendants, requiring each of them to answer this complaint fully and truthfully, but not under oath, answer under oath being expressly waived as to each of said defendants.

(2) That a temporary restraining order be issued, restraining the defendants and each of them from enforcing said Act 51 of the Louisiana Legislature of 1934 against the plaintiff and that each of said defendants be enjoined and restrained from directly or indirectly instituting or maintaining any actions at law or suits in equity for the recovery of or from the plaintiff of the taxes provided for

in said Act or any of the penalties therein prescribed for the nonpayment of such taxes; from enforcing or preparing for the enforcement of said Act and from taking any steps looking to the exclusion of plaintiff from carrying on its business in the State of Louisiana and from taking any steps looking to the prosecution of the plaintiff, its agents, servants or employees for the violation of said Act and [fol. 16] from in any manner interfering with the operation and carrying on of plaintiff's business in the State of Louisiana.

(3) That a hearing on plaintiff's application for an interlocutory injunction be had on a date and at an hour to be fixed by the Court before a Court constituted as required by Section 265 of the Judicial Code of the United States as amended after not less than five days notice as provided by the statute and that upon such hearing an interlocutory injunction do issue, restraining the defendants and each of them from enforcing said Act 51 of the Louisiana Legislature of 1934 against the plaintiff and from directly or indirectly instituting or maintaining any actions at law or suits in equity for the recovery of or from the plaintiff of the taxes provided for in said Act or any of the penalties therein prescribed for the non-payment of such taxes; from enforcing or preparing for the enforcement of said Act and from taking any steps looking to the exclusion of plaintiff from carrying on its business in the State of Louisiana and from taking any steps looking to the prosecution of the plaintiff, its agents, servants or employees for the violation of said Act and from in any manner interfering with the operation or carrying on of the plaintiff's business in the State of Louisiana.

(4) That upon a final hearing of the cause, said Act No. 51 of the Louisiana Legislature of 1934 be declared unconstitutional, null and void as in violation of the Constitution of the United States and also as in violation of the Constitution of the State of Louisiana and that the enforcement thereof be perpetually enjoined.

Plaintiff further prays for all general and equitable relief and such further orders as the nature of the case may require and as may be just and equitable in the premises.

(Signed) Monroe & Lemann, Solicitors for Plaintiff.

[fol. 17] *Duly sworn to by J. C. Peregoy. Jurat omitted in printing.*

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINANT'S APPLICATION FOR RESTRAINING ORDER AND TEMPORARY INJUNCTION—Filed February 27, 1935

Comes now plaintiff and files this its motion for the issuance of a restraining order for the reasons and on the grounds set forth in its petition to prevent irreparable damage to plaintiff, and plaintiff further makes its application to this Court for a hearing in this cause for an interlocutory injunction in accordance with Section 266 of the Judicial Code of the United States as amended.

(Signed) Monroe & Lemann, Solicitors for Plaintiff.

Service accepted and legal rights reserved February 27/35.

(Signed) Justin C. Daspit, Atty. for Defendants.

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF INTERVENORS FOR LEAVE TO FILE INTERVENTIONS AND FOR RESTRAINING ORDER AND TEMPORARY INJUNCTION —Filed February 27, 1935

To the Honorable the Judges of the United States District Court for the Eastern District of Louisiana:

Now come W. T. Grant Company, a Massachusetts corporation, H. L. Green Company, Inc., a New York corporation, G. R. Kinney Co., Inc., a New York corporation, Liggett Drug Company, Inc., a Delaware corporation, Melville Shoe Corporation, a New York corporation, Montgomery, Ward & Co., Incorporated, an Illinois corporation, J. J. Newberry Company, a Texas corporation, J. C. Penney Company, a Delaware corporation, Sears Roebuck & Co., a New York corporation, The Scott-Burr Stores Corporation, a Delaware corporation, Wohl Shoe Corporation, a Missouri corporation, and F. W. Woolworth Co., a New

York corporation, and move the Court for permission to assert their rights by intervention in the above entitled and numbered cause by filing the Bills of Intervention accompanying this motion, and further move the Court that the restraining order heretofore issued herein be made applicable to them respectively as intervenors for the reasons and on the grounds set forth in said accompanying Bills and in order to prevent irreparable damage to them respectively, and that interlocutory injunctions issue upon hearing in favor of intervenors respectively against the defendants in the same terms as the interlocutory injunction [fol. 20] prayed for by plaintiff, and that a hearing upon the application of intervenors for such injunction be had in accordance with Section 266 of the Judicial Code of the United States as amended.

(Signed) Monroe & Lemann, Solicitors for Intervenors.

[fol. 21] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENING BILL OF COMPLAINT OF LIGGETT DRUG COMPANY, INC.—Filed February 27, 1935

To the Honorable the United States District Court for the Eastern District of Louisiana:

Liggett Drug Company, Inc., a corporation organized and existing under the laws of the State of Delaware and a citizen and resident of said State, files this its intervention in the above numbered and entitled cause, and respectfully represents that:

I

Intervenor is a corporation organized and existing under the laws of the State of Delaware and is a citizen and resident of that State. Intervenor has complied with all the laws of the State of Louisiana relating to foreign corporations and is authorized to do and is doing business in said State. Intervenor is in the business of selling at retail drugs, medicines, toilet preparations and other articles of merchandise. Intervenor owns and operates six stores in the State of Louisiana, of which three are situated in the City of New Orleans and one each in the Cities of Baton Rouge, Shreveport and Alexandria. Outside of Louisiana

intervenor owns and operates 367 stores located in 29 states and the District of Columbia, and has subsidiary companies which own and operate 79 additional stores in 4 additional states, making a grand total of 446 stores in 33 states and the District of Columbia.

II

The above entitled cause was commenced in this Court on the 27th day of February, 1935 by the filing of a Bill of Complaint praying for the issuance of a temporary restrain- [fol. 22] ing order, restraining the defendants from enforcing Act 51 of the Louisiana Legislature of 1934, for the issuance pendente lite of an interlocutory injunction, and for a final decree declaring said Act unconstitutional, null and void and permanently enjoining the enforcement thereof.

III

Intervenor has an interest in the above entitled cause arising out of the fact that Act 51 of the Louisiana Legislature of 1934, the validity of which is at issue, undertakes to impose a tax upon intervenor in favor of the State of Louisiana based upon the operation by intervenor of stores outside the State, which tax is violative of the Constitution of the United States as well as the Constitution of the State of Louisiana, for the reasons set forth in the original Bill of Complaint.

IV

Intervenor paid to the State of Louisiana and its subdivisions during the year 1934 in respect of the six stores operated by intervenor in the State of Louisiana, taxes as follows:

State, City and Parish license taxes for the privilege of selling merchandise at retail, including liquor taxes	$3,790.00
State, City and Parish ad valorem property taxes	3,577.45
Total	$7,367.45

The above is exclusive of franchise taxes, income taxes and chain store tax under Act 19 of the Louisiana Legislature of 1932. Intervenor has an investment in its stores in the State of Louisiana approximating $100,000 in value.

V

The effect of Act 51 of the Louisiana Legislature of 1934 is to subject intervenor to a tax based upon the number of stores which intervenor operates in other states, which tax so based is fixed at $300 per store for the six stores operated by intervenor in the State of Louisiana. Other persons, firms or corporations engaged in the same line of business as intervenor and operating only six stores in the State of Louisiana and no store outside the State of Louisiana are subjected to a tax of only $10 per store under said Act. The aggregate tax payable by intervenor for its six stores in Louisiana under the statute aforesaid is $3,000, which is fifty times as much as the aggregate of $60 payable by a person, firm or corporation engaged in the same line of business as intervenor and operating the same number of stores in the State of Louisiana as intervenor and no stores [fol. 23] elsewhere. Intervenor enjoys no advantage over other persons, firms or corporations operating only six stores in the State of Louisiana and no store elsewhere which would justify a discrimination in tax of 3000%, or anything approaching the same, and such discrimination is arbitrary, unreasonable, oppressive and confiscatory, and denies to intervenor the equal protection of the laws.

Under the operation of the Louisiana statute, if intervenor should open 34 additional stores in any part of the world, the taxes assessed by the State of Louisiana against intervenor for six stores in the State of Louisiana would be further increased by the sum of $50 per store. Such increase would be entirely predicated upon the establishment and operation of stores outside the jurisdiction of Louisiana. The operation by intervenor of 34 additional stores outside the borders of Louisiana would add nothing to the value of the stores operated by intervenor in Louisiana. The effect of the Louisiana statute is to interfere with the conduct by intervenor of its business in other states and foreign countries, over which Louisiana has no jurisdiction, and to require intervenor to pay to Louisiana additional taxes for the privilege of doing business in other states and foreign countries. The effect of the Louisiana statute is to burden, hamper and restrain the operations of intervenor in other states and to interfere with the right of other states to encourage the operation of intervenor's business in those states by non-discriminatory taxation, if

that should be the policy of those states, since the Louisiana statute prevents intervenor from establishing stores in other states without paying additional taxes in Louisiana for so doing.

VI

The discrimination established by Act 51 of the Louisiana Legislature of 1934 between intervenor and other corporations operating solely in the State of Louisiana, and the denial of the equal protection of the laws thereby caused to intervenor is disclosed by a comparison of the operation of said Act upon intervenor with its operation upon other corporations operating in the State of Louisiana chains of drug stores in competition with intervenor.

Katz & Besthoff, Ltd. is a corporation organized under the laws of the State of Louisiana, which owns and operates in the State of Louisiana ten drug stores engaged in precisely the same character of business as intervenor under the same conditions. The stores so owned and operated by said Katz & Besthoff, Ltd. are situated in the City of New Orleans and are in direct competition with intervenor's stores in said city. There is a Katz & Besthoff, Ltd. store within two or three blocks of every store of intervenor in [fol. 24] the City of New Orleans, and in some instances there are two or three Katz & Besthoff, Ltd. stores within two or three blocks of intervenor's stores. Under Act 19 of 1932, the preceding Louisiana Act, the taxes payable to the State of Louisiana by intervenor were precisely the same as the taxes paid by Katz & Besthoff, Ltd., i.e. nothing on the first store, $15 per store on the second to fifth store and $25 per store on stores from six to ten. Under Act 51 of 1934, the taxes payable by Katz & Besthoff, Ltd. become only $10 upon every store, while the taxes payable by intervenor become $500 per store. Katz & Besthoff, Ltd. operating ten stores in the State of Louisiana, or more by more than 30% than the number of stores operated by intervenor in said state, pays an aggregate chain store tax to the State of Louisiana of $100, while intervenor operating six stores in the State of Louisiana, or four less than Katz & Besthoff, Ltd., pays an aggregate of $3,000, or thirty times as much aggregate tax for operating slightly more than half the number of stores. If intervenor undertook to operate the same number of stores in Louisiana as Katz & Besthoff, Ltd., intervenor would be required to pay a total of $5,000

to the State of Louisiana as compared with the total of $100 which Katz & Besthoff, Ltd. are required to pay for the same number of stores, or fifty times as much. If intervenor thereupon opened 49 additional stores in the States of New York and Pennsylvania, or the Dominion of Canada or anywhere else in the world, petitioner would be required to pay to the State of Louisiana for ten stores an aggregate of $5,500 as compared with $100 payable by Katz & Besthoff, Ltd. for ten stores.

Upon information and belief, intervenor avers that Katz & Besthoff, Ltd. have assets approximating $1,000,000, all of which are invested in the State of Louisiana, and said Katz & Besthoff, Ltd. have over ten times the capital invested in the State of Louisiana that intervenor has. Upon information and belief, intervenor avers that Katz & Besthoff, Ltd.'s sales in the City of New Orleans in the year 1934 were in excess of $1,400,000 as compared with intervenor's total sales in the entire State of Louisiana of approximately $600,000 in that year. Intervenor enjoys no advantage whatsoever in operation over Katz & Besthoff, Ltd. Katz & Besthoff, Ltd. have every possible advantage that intervenor or any other drug chain has, including ability to purchase on the best quantity basis, ample capital, large turn-over and every other advantage which may be considered to inhere in chain stores; and Katz & Besthoff, Ltd. have the advantage of direct, local supervision, ownership, contact and management. Upon information and be- [fol. 25] lief intervenor avers that the operations of Katz & Besthoff, Ltd. in the State of Louisiana are substantially more profitable than intervenor's operations in said state per store, and that Katz & Besthoff, Ltd. sales and profits are greater per store than are intervenor's. By establishing a differential of approximately $500 per store per year in the tax imposed upon intervenor as compared with the tax imposed upon Katz & Besthoff, Ltd. and by subjecting intervenor to a rate of taxation fifty times greater than the rate of taxation imposed upon Katz & Besthoff, Ltd., the Louisiana statute referred to denies to intervenor the equal protection of the laws, and by its purely arbitrary operation taxes intervenor's property without due process of law.

VII

Economical Drug Stores, Inc. is a Louisiana corporation operating a chain of seventeen drugstores in the City of

New Orleans. Under Act 19 of 1932 said Economical Drug Stores, Inc. paid a tax of $15 per store upon two to five stores, $25 per store upon six to ten stores, $30 per store upon eleven to fifteen stores and $40 per store upon stores exceeding fifteen and less than twenty. Under said Act the aggregate tax payable to the State of Louisiana by Economical Drug Stores, Inc. for seventeen stores was $385. Under Act 51 of 1934 the aggregate tax payable to the State of Louisiana by said Economical Drug Stores, Inc. for seventeen stores is reduced to $205. At the same time the tax on intervenor on six stores is increased from an aggregate of $85 under Act 19 of 1932 to an aggregate of $3,000 under Act 51 of 1934. For operating slightly over one-third of the number of stores in the State of Louisiana that Economical Drug Stores, Inc. operates, intervenor is required to pay a tax approximately 15 times as great. If intervenor undertook to operate sixteen stores in the State of Louisiana, intervenor would be required to pay under Act 51 of 1934 taxes aggregating $8,000 as compared with $205 payable by Economical Drug Stores, Inc., or approximately forty times as much. The drugstores of Economical Drug Stores, Inc. are operated in direct competition with the drugstores of intervenor. They also enjoy the advantage of large purchasing power and chain store organization, and there is no difference between the circumstances of operation of said stores and the circumstances of operation of intervenor's stores in the State of Louisiana which would remotely justify or support the discrimination made by Act 51 of the Louisiana Legislature of 1934, by which [fol. 26] intervenor is denied the equal protection of the laws.

VIII.

American Drug Company, Inc., is a Louisiana corporation operating a chain of five drugstores in the City of New Orleans. Under Act 19 of 1932 said American Drug Company, Inc. paid an aggregate tax of $60 to the State of Louisiana for five stores. Under Act 51 of 1934 the aggregate tax payable to the State of Louisiana by said American Drug Company, Inc. for five stores is reduced to $50, while at the same time the tax on intervenor for six stores is increased from an aggregate of $85 under Act 19 of 1932 to an aggregate of $3,000 under Act 51 of 1934. For operating one more store in the State of Louisiana than American Drug Company, Inc. operates, intervenor is required

to pay a tax sixty times as great. The drugstores of American Drug Company, Inc. are operated in direct competition with the drugstores of intervenor. They also enjoy the advantage of large purchasing power and chain store organization, and there is no difference between the circumstances of operation of said stores and the circumstances of operation of intervenor's stores in the State of Louisiana which would remotely justify or support the discrimination made by Act 51 of the Louisiana Legislature of 1934, by which intervenor is denied the equal protection of the laws.

IX

Intervenor adopts and reavers all of the allegations of the original Bill of Complaint herein with the same effect as if the same were specifically repeated herein, intervenor's allegations as to the facts applicable only to the original plaintiff being made upon information and belief derived from a reading of the original Bill of Complaint. Intervenor avers that all of the allegations of the original Bill of Complaint, save those which on their face relate solely to the operations of the plaintiff, are equally true of intervenor. Intervenor avers that it has tendered to the Supervisor of Public Accounts the amount of taxes due by it under Act 19 of the Legislature of 1932 amounting to $85 as compared with the taxes of $3,000 demanded of intervenor under Act 51 of 1934, and intervenor avers that the Supervisor declined to accept such tender and insists upon the payment by intervenor of the taxes imposed by Act 51 of 1934, which intervenor alleges to be unconstitutional, null and void.

Wherefore, intervenor prays that an order be entered [fol. 27] granting intervenor leave to file this intervention; that writs of subpoena be issued to each of the defendants, requiring each of them to answer this intervention fully and truthfully but not under oath, answer under oath being expressly waived; that the temporary restraining order heretofore issued in this cause be made applicable in favor of intervenor; that an interlocutory injunction issue upon hearing in favor of intervenor against the defendants in the same terms as the interlocutory injunction prayed for by plaintiff; and that upon a final hearing Act 51 of the Louisiana Legislature of 1934 be declared unconstitutional, null and void, and the enforcement thereof be perpetually

enjoined. Intervenor further prays for all general and equitable relief and such further orders as the nature of the case may require and as may be just and equitable in the premises.

(Signed) Monroe & Lemann, Solicitors for Intervenor.

Duly sworn to by H. R. Bierhorst. Jurat omitted in printing.

[fol.28] IN UNITED STATES DISTRICT COURT

[Title omitted.]

INTERVENING BILL OF COMPLAINT OF MONTGOMERY, WARD & CO., INC.—Filed February 27, 1935

To the Honorable the United States District Court for the Eastern District of Louisiana:

Montgomery, Ward & Co., Incorporated, a corporation organized and existing under the laws of the State of Illinois and a citizen and resident of said State, files this its intervention in the above numbered and entitled cause, and respectfully represents that:

I.

Intervenor is a corporation organized and existing under the laws of the State of Illinois and is a citizen and resident of that State. Intervenor has complied with all the laws of the State of Louisiana relating to foreign corporations and is authorized to do and is doing business in said State. Intervenor is in the business of selling general merchandise at retail. Intervenor owns and operates five stores in the State of Louisiana, one at the each of the following points: Shreveport, Monroe, Lafayette, Baton Rouge and Alexandria. Outside Louisiana intervenor owns and operates 486 stores in 45 states.

II.

The above entitled cause was commenced in this Court on the 27th day of February, 1935 by the filing of a Bill of Complaint praying for the issuance of a temporary restraining order, restraining the defendants from enforcing Act 51 of the Louisiana Legislature of 1934, for the issuance of pendente lite of an interlocutory injunction, and for

a final decree declaring said Act unconstitutional, null and void and permanently enjoining the enforcement thereof.

[fol. 29]

III.

Intervenor has an interest in the above entitled cause arising out of the fact that Act 51 of the Louisiana Legislature of 1934, the validity of which is at issue, undertakes to impose a tax upon intervenor in favor of the State of Louisiana based upon the operation by intervenor of stores outside the State, which tax is violative of the Constitution of the United States as well as the Constitution of the State of Louisiana, for the reasons set forth in the original Bill of Complaint.

IV.

Intervenor paid to the State of Louisiana and its subdivisions during the year 1934 in respect of the five stores operated by intervenor in the State of Louisiana, taxes as follows:

State, City and Parish license taxes for the privilege of selling merchandise at retail	$1,700.00
State, city and Parish ad valorem property taxes	7,204.16
Chain store tax under Act 19 of the Louisiana Legislature of 1932	75.00
Total	$8,979.16

The above is exclusive of franchise taxes and income taxes. Intervenor has an investment in its stores in the State of Louisiana approximating $300,000 in value.

V.

The effect of Act 51 of the Louisiana Legislature of 1934 is to subject intervenor to a tax based upon the number of stores which intervenor operates in other states, which tax so based is fixed at $500 per store for the five stores operated by intervenor in the State of Louisiana. Other persons, firms or corporations engaged in the same line of business as intervenor and operating only five stores in the State of Louisiana and no store outside the State of Louisiana are subjected to a tax of only $10 per store under said Act. The aggregate tax payable by intervenor for its five stores in Louisiana under the statute aforesaid is $2,500, which is fifty times as much as the aggregate of $50

payable by a person, firm or corporation engaged in the same line of business as intervenor and operating the same number of stores in the State of Louisiana as intervenor and no stores elsewhere. Intervenor enjoys no advantage over other persons, firms or corporation operating only five stores in the State of Louisiana and no store elsewhere which would justify a discrimination in tax of 5,000%, or anything approaching the same, and such discrimination is arbitrary, unreasonable, oppressive and confiscatory, and denies to intervenor the equal protection of the laws.

[fol. 30] The effect of the Louisiana statute is to tax intervenor upon the operation of stores outside Louisiana. Intervenor is now paying sums aggregating $4,500 in chain store taxes to twelve states other than Louisiana in which intervenor operates an aggregate of 107 stores, each of said states other than Louisiana taxing intervenor only with respect to the stores operated within the borders of such state and only by reference to the stores located within the borders of the taxing state. The existence of these 107 stores, which are taxed in the states in which they are respectively located, is taken by the State of Louisiana under the provisions of Act 51 of 1934 as a basis for increasing the Louisiana tax upon intervenor from $450 per Louisiana store to $500 per Louisiana store. The effect of the Louisiana statute is to impose upon intervenor an additional tax aggregating $250 because of the existence outside of Louisiana of 107 stores which are operated in 12 other states and which are already paying taxes in such states, to the jurisdiction of which said 107 stores are respectively subject.

Under the operation of the Louisiana statute, if intervenor should open ten additional stores in any part of the world, the taxes assessed by the State of Louisiana against the intervenor for five stores in the State of Louisiana would be further increased by an aggregate sum of $250. Such increase would be entirely predicated upon the establishment and operation of stores outside the jurisdiction of Louisiana. The operation by intervenor of ten additional stores outside the borders of Louisiana would add nothing to the value of the stores operated by intervenor in Louisiana. The effect of the Louisiana statute is to interfere with the conduct by intervenor of its business in other states and foreign countries, over which Louisiana has no juris-

diction, and to require intervenor to pay to Louisiana additional taxes for the privilege of doing business in other states and foreign countries. The effect of the Louisiana statute is to burden, hamper and restrain the operations of intervenor in other states and to interfere with the right of other states to encourage the operation of intervenor's business in those states by non-discriminatory taxation, if that should be the policy of those states, since the Louisiana statute prevents intervenor from establishing stores in other states without paying additional taxes in Louisiana for so doing.

Intervenor's five stores in the State of Louisiana are, and during the year 1934 were, less profitable than intervenor's stores outside the State of Louisiana. The Louisiana statute proceeds upon the assumption that the stores in Louisiana may be taxed not only by reference to the existence of stores elsewhere but upon the assumption that all [fol. 31] stores existing in any part of the world are of the same value as the stores in Louisiana, and that the stores in Louisiana are operated under the same conditions, transact the same average amount of business and yield the same average profit. These assumptions are contrary to fact and rest only upon an arbitrary basis. Conditions attendant upon the operation and results of stores throughout the world depend upon a wide range of circumstances, of which the number of units is only one. The effect of the Louisiana statute is to give a controlling weight only to number of units wherever located in the world and to disregard all other circumstances and conditions whatsoever. The presumption upon which the Louisiana statute relies is contrary to reason, and in case of intervenor specifically unfounded in fact.

VI

Act 51 of the Louisiana Legislature of 1934 violates the provisions of the Constitution of the United States, Amendment 14, Section 1 by depriving intervenor of its property without due process of law and by denying to intervenor equal protection of the laws, in that, as appears from the allegations of the principal Bill of Complaint and this intervening bill:

(a) Said Act undertakes to tax property and business beyond the jurisdiction of the State;

(b) Said Act discriminates without justification between intervenor and others operating a similar business under similar circumstances in the State of Louisiana;

(c) There is no basis for the classification fixed by said Act, and said classification is unjust, oppressive, unreasonable, discriminatory and arbitrary:

(d) Said Act undertakes to levy a chain store license tax upon stores operated by intervenor in states other than Louisiana, the operations of which stores are taxed by said states.

For the reasons aforesaid, said Act also violates the provisions of Article 1 of the Constitution of Louisiana for the year 1921 and particularly Sections 2 and 6 thereof.

Said statute also violates the provisions of Article 1, Section 8, Sub-division 3 of the Constitution of the United States, by levying a tax upon commerce carried on by intervenor outside the territorial limits of the State of Louisi- [fol. 32] ana and by burdening, interfering with and regulating interstate and foreign trade and commerce.

VII

Intervenor owns and operates, in addition to the 491 retail stores heretofore referred to, nine mail order houses located at Albany, New York, Baltimore, Maryland, St. Paul, Minnesota, Chicago, Illinois, Kansas City, Missouri, Denver, Colorado, Fort Worth, Texas, Portland, Oregon, and Oakland, California, respectively, all of which are commonly regarded as "mercantile establishments" and which are actively engaged in interstate commerce by the receipt of orders from, and shipment of merchandise to, all parts of the United States. Intervenor also owns and operates nineteen order stations, all located outside the state of Louisiana, and all of which are exclusively engaged in interstate commerce. Intervenor rents space for each of said order stations, maintains at least one regular employee at each station, and maintains a stock of samples at each station, upon which taxes are paid to the states wherein they are respectively located. The only business transacted in said stations is the taking of orders for merchandise, which are transmitted to, and filled by the aforesaid mail order houses. Intervenor alleges that while the present administrative interpretation of said Act 51 of the

Louisiana Legislature of 1934 apparently limits the operation of said Act to the intervenor's retail stores, the words "mercantile establishments" used in said Act apparently include the aforesaid mail order houses and order stations owned and operated by the intervenor. Said Act does not by its terms exclude from its operation said establishments engaged in interstate commerce, and therefore violates the Commerce Clause of the United States Constitution as heretofore alleged in Section VI of this intervention.

VIII

Intervenor adopts and reavers all of the allegations of the original Bill of Complaint herein with the same effect as if the same were specifically repeated herein, intervenor's allegations as to facts applicable only to the original plaintiff being made upon information and belief derived from a reading of the original Bill of Complaint. Intervenor avers that all of the allegations of the original Bill of Complaint, save those which on their face relate solely to the [fol. 33] operations of the plaintiff, are equally true of intervenor. Intervenor avers that it has, by its counsel herein, tendered to the Supervisor of Public Accounts the amount of taxes due by it under Act 19 of the Legislature of 1932 amounting to $85 as compared with the taxes of $2,500 demanded of intervenor under Act 51 of 1934, and intervenor avers that the Supervisor declined to accept such tender and insists upon the payment by intervenor of the taxes imposed by Act 51 of 1934, which intervenor alleges to be unconstitutional, null and void.

Wherefore, intervenor prays that an order be entered granting intervenor leave to file this intervention; that writs of subpoena be issued to each of the defendants, requiring each of them to answer this intervention fully and truthfully but not under oath, answer under oath being expressly waived; that the temporary restraining order heretofore issued in this cause be made applicable in favor of intervenor; that an interlocutory injunction issue upon hearing in favor of intervenor against the defendants in the same terms as the interlocutory injunction prayed for by plaintiff; and that upon a final hearing Act 51 of the Louisiana Legislature of 1934 be declared unconstitutional, null and void, and the enforcement thereof be perpetually en-

joined. Intervenor further prays for all general and equitable relief and such further orders as the nature of the case may require and as may be just and equitable in the premises.

(Signed) Monroe & Lemann, Solicitors for Intervenor.

[fol. 34] *Duly sworn to by Stuart S. Ball. Jurat omitted in printing.*

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted.]

ORDER GRANTING TEMPORARY RESTRAINING ORDER—Filed February 27, 1935

Whereas in the above numbered and entitled cause, it has been made to appear to the undersigned District Judge by the original Bill of Complaint filed herein that prima facie the plaintiff is entitled to an interlocutory injunction preliminary to a final hearing, on the ground that the provisions of Act 51 of the Legislature of Louisiana of 1934 are in violation of the provisions of the Constitution of Louisiana and the Constitution of the United States set out in said Bill, and said Bill contains a prayer for the issuance of a temporary restraining order pending a hearing and determination of plaintiff's application for the issuance of an interlocutory injunction;

And it appearing to the undersigned District Judge that for the reasons set forth in the verified Bill of Complaint and particularly paragraph XX thereof, there is danger of immediate and irreparable injury, loss and damage being caused to plaintiff, its officers, agents and employees by an attempt to enforce the provisions of said Act 51 of the Louisiana Legislature of 1934 before a hearing and determination of the application for an interlocutory injunction can be had, and that plaintiff is therefore entitled to protection by a temporary restraining order:

Now, therefore, on motion of the plaintiff, notice having been given to defendants,

It is ordered that upon the execution by plaintiff of a bond with good and sufficient surety to be approved by [fol. 36] this Court, in the penal sum of Sixty Thousand ($60,000.00) Dollars, conditioned upon the payment by the

plaintiff of such damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained hereby, a temporary restraining order issue as prayed for in the Bill of Complaint, enjoining and restraining the defendants, Alice Lee Grosjean, Supervisor of Public Accounts of the State of Louisiana, and Gaston L. Porterie, Attorney General of the State of Louisiana, and each of them, from enforcing said Act 51 of the Louisiana Legislature of 1934 against the plaintiff, and enjoining and restraining each of said defendants from directly or indirectly instituting or maintaining any actions at law or suits in equity for the recovery of or from the plaintiff of the taxes provided for in said Act or any of the penalties therein prescribed for the non-payment of such taxes, from the enforcement or preparing for the enforcement of said Act and from taking any steps looking to the exclusion of plaintiff from carrying on its business in the State of Louisiana, and from taking any steps looking to the prosecution of plaintiff, its agents, servants, or employees for the violation of said Act, and from in any manner interfering with the operation of and carrying on of plaintiff's business in the State of Louisiana.

This temporary restraining order is granted because it appears that immediate and irreparable injury, loss or damage will result to the plaintiff before a hearing and determination of said application for said interlocutory injunction can be had, and particularly because, in the absence of a restraining order, if the plaintiff does not pay the taxes imposed by said Act 51 of the Louisiana Legislature of 1934, the validity of which is involved in this suit, plaintiff, its officers, agents and employees may be immediately subjected to numerous prosecutions with the possibility of large fines and terms of imprisonment, and plaintiff's business and property in the State of Louisiana may be subjected to irreparable damage and injury.

This restraining order shall expire ten days after its entry unless within that time the restraining order is extended for a like period for good cause shown, the reason for such extension to be entered of record.

It is further ordered that the application for a preliminary injunction herein be heard in the courtroom of the United States District Court at New Orleans, Louisiana, on the 8th day of March, 1935 at 11 o'clock A. M. before

[fol. 37] a statutory court of three judges, to be convened under and in accordance with Section 266 of the United States Judicial Code, and that defendants then and there show cause, if any they have or can, why the preliminary injunction prayed for should not issue, and that not less than five days' notice of such hearing be given to the said defendants and also to the Honorable O. K. Allen, Governor of the State of Louisiana, and the Honorable Gaston L. Porterie, Attorney-General of the State of Louisiana.

It is further ordered that a copy of this order certified with the seal of this Court be served upon the defendants.

New Orleans, La., February 27, 1935, at 5:50 P. M.

(Sgd.) Wayne G. Borah, Judge.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted.]

ORDER PERMITTING FILING OF INTERVENTIONS AND EXTENDING ORDER—Filed February 27, 1935

In the above entitled and numbered matter, it appearing to the Court from the allegations of the verified Bills submitted for filing by the intervenors hereinafter named, that said intervenors should be permitted to assert their rights by intervention in the above entitled and numbered cause, and that the restraining order heretofore issued herein should be made applicable in favor of said intervenors respectively, subject to the filing of bonds by them as hereinafter provided:

It is Ordered by the Court that the following named corporations be and they hereby are granted leave to intervene in the above entitled and numbered cause in the same manner and with like effect as if named in the original Bill as parties plaintiff, to-wit:

W. T. Grant Company.
H. L. Green Company, Inc.
G. R. Kinney Co., Inc.
Liggett Drug Company, Inc.
Melville Shoe Corporation.
Montgomery, Ward & Co., Incorporated.
J. J. Newberry Company.

J. C. Penney Company.
Sears Roebuck & Co.
The Scott-Burr Stores Corporation.
Wohl Shoe Corporation.
F. W. Woolworth Co.

[fol. 39] It is Further Ordered that, upon the execution by such intervenors respectively of bonds with good and solvent sureties and conditioned as required by law in the sums hereinafter set forth, the restraining order heretofore issued in this cause be and it hereby is made applicable to and in favor of such intervenors respectively as so furnish bond, restraining and enjoining the defendants in the above entitled and numbered cause from enforcing Act 51 of the Louisiana Legislature of 1934 against such intervenors respectively, and enjoining and restraining each of said defendants from directly or indirectly instituting or maintaining any actions at law or suits in equity for the recovery of or from such intervenors respectively of the taxes provided for in said Act or any of the penalties therein prescribed for the nonpayment of such taxes, from the enforcement or preparing for the enforcement of said Act against such intervenors respectively, from taking any steps looking to the exclusion of such intervenors respectively from carrying on their businesses in the State of Louisiana, and from taking any steps looking to the prosecution of such intervenors respectively, their agents, servants or employees for the violation of said Act, or from in any manner interfering with the operation of and carrying on by such intervenors respectively of their businesses in the State of Louisiana. The amount of the bonds to be furnished by such intervenors respectively is hereby fixed as follows:

W. T. Grant Company, $3000.00.
H. L. Green Company, Inc., $125.00.
G. R. Kinney Co., Inc., $1500.00.
Liggett Drug Company, Inc., $3500.00.
Melville Shoe Corporation, $4000.00.
Montgomery, Ward & Co., Incorporated, $3000.00.
J. J. Newberry Company, $1500.00.
J. C. Penney Company, $5000.00.
Sears Roebuck & Co., $2500.00.
The Scott-Burr Stores Corporation, $350.00.
Wohl Shoe Corporation, $2000.00.
F. W. Woolworth Co., $8500.00.

The temporary restraining order is hereby made applicable to the respective intervenors because it appears that immediate and irreparable injury, loss or damage will result to them respectively before a hearing and determi-
[fol. 40] nation of said application for said interlocutory injunction can be had, and particularly because, in the absence of a restraining order, if the intervenors respectively do not pay the taxes imposed by said Act 51 of the Louisiana Legislature of 1934, the validity of which is involved in this suit, they, their officers, agents and employees may be immediately subjected to numerous prosecutions with the possibility of large fines and terms of imprisonment, and their businesses in the State of Louisiana may be subjected to irreparable damage and injury.

The restraining order as hereby made applicable to intervenors shall expire ten days after its entry unless within that time the restraining order is extended for a like period for good cause shown, the reason for such extension to be entered of record.

It is Further Ordered that the applications of intervenors for a preliminary injunction herein be heard in the courtroom of the United States District Court at New Orleans, Louisiana on the 8th day of March, 1935 at 11 o'clock A. M. before a statutory court of three judges, to be convened under and in accordance with Section 266 of the United States Judicial Code, and that the defendants then and there show cause, if any they have or can, why the preliminary injunction herein prayed for in favor of the respective intervenors and against the defendants should not issue, and that not less than five days' notice of such hearing be given to the said defendants and also to the Honorable O. K. Allen, Governor of the State of Louisiana, and the Honorable Gaston L. Porterie, Attorney General of the State of Louisiana.

It is Further Ordered that a copy of this order certified with the seal of this Court be served upon the defendants.

New Orleans, La., February 27th, 1935.

(Sg.) Wayne G. Borah, Judge.

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONTINUING RESTRAINING ORDER IN FORCE UNTIL APPLICATION FOR INTERLOCUTORY INJUNCTION IS HEARD—Filed April 8, 1935

On motion of counsel in the above entitled and numbered cause and on suggesting to the Court that counsel have agreed that further time is required to prepare for a hearing upon the application for interlocutory injunction herein and that counsel have agreed to continue such hearing from the time heretofore fixed and have entered into a stipulation so providing as will appear from the original stipulation filed herewith:

It is Ordered by the Court that the hearing on the application for a preliminary injunction be and it hereby is continued by consent of parties to the 15th day of June, 1935, at 11 o'clock.

It is Further Ordered that the temporary restraining order heretofore entered in this matter on February 27th, 1935 and now in effect be and the same is hereby continued in full force and effect until June 15, 1935, and until the application for an interlocutory injunction has been heard and determined.

New Orleans, La., April 8, 1935.

(Signed) Wayne G. Borah, Judge.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR INTERLOCUTORY INJUNCTION—Filed June 24, 1935

This cause came on to be heard this day upon the application of the plaintiff and intervenors for an interlocutory injunction or injunction pendente lite herein, and was submitted to the Court for decision upon the pleadings and exhibits and the affidavits of the plaintiff and intervenors to the original bill of complaint and the intervening bills of complaint offered in evidence herein.

Whereupon, the defendants, the Supervisor of Public Accounts and the Attorney General of the State of Louisiana, through their counsel of record, having agreed without

prejudice to the ultimate rights of any party to this suit, whether such party be the complainant, the defendants or any one of the intervenors, that it was proper for the matters involved to be held in statu quo until a hearing might be had upon the merits, and the Court being of the opinion that the issuance of an interlocutory injunction is proper:

It is Ordered, Adjudged and Decreed that the application of plaintiff and intervenors for an interlocutory injunction be granted, and that an interlocutory injunction or injunction pendente lite issue herein, enjoining and restraining the defendants, Alice Lee Grosjean, Supervisor of Public Accounts, and Gaston L. Porterie, Attorney General of the State of Louisiana, and each of them, from directly or in- [fol. 43] directly instituting or maintaining any actions at law or suits in equity for the recovery of or from the plaintiff or any of the intervenors herein of the taxes provided for in Act 51 of the Legislature of Louisiana for the year 1934 or any of the penalties therein prescribed for the non-payment of such taxes; from enforcing or preparing for the enforcement of said Act; and from taking any steps looking to the exclusion of plaintiff or any of the intervenors from carrying on their respective businesses in the State of Louisiana and from taking any steps looking to the prosecution of the plaintiff or any of the intervenors or any of their agents, servants or employees for the violation of said Act; and from in any manner interfering with the operation and carrying on of the business of plaintiff or any of the intervenors in the State of Louisiana; provided, however, that plaintiff for itself and each of the intervenors for itself shall within thirty (30) days from the entry of this order execute and file with the Clerk of this Court a bond with good and sufficient surety to be approved by the Clerk conditioned for the payment by the plaintiff and the intervenors respectively of such damages as may be incurred or suffered by any party who may be found to be wrongfully enjoined or restrained hereby, the amount of the bonds to be furnished by the plaintiff and intervenors respectively being hereby fixed as follows:

	Amount
The Great Atlantic & Pacific Tea Company	Seventy-seven thousand ($77,000.00) Dollars.
Consolidated Millinery Company	Seventeen Hundred ($1,700.00) Dollars.

	Amount
W. T. Grant Company	Thirty-five Hundred ($3,500.00) Dollars.
H. L. Green Company, Inc.	One Hundred Fifty ($150.00) Dollars.
C. R. Kinney Co., Inc.	Eighteen Hundred ($1,800.00) Dollars.
Liggett Drug Company, Inc.	Four Thousand ($4,000.00) Dollars.
Montgomery, Ward & Co., Incorporated	Thirty-three Hundred ($3,300.00) Dollars.
J. J. Newberry Company	Fifteen Hundred ($1,500.00) Dollars.
J. C. Penney Company	Six Thousand ($6,000.00) Dollars.

[fol. 44]

Sears Roebuck & Co.	Twenty-seven Hundred ($2,700.00) Dollars.
The Scott-Burr Stores Corporation	Four Hundred ($400.00) Dollars.
Wohl Shoe Corporation	Twenty-four Hundred ($2,400.00) Dollars.
F. W. Woolworth Co.	Eleven Thousand ($11,000.00) Dollars.

In lieu of furnishing bond the plaintiff or any intervenor may make a deposit with the Clerk of a sum of money equal to the amount hereinabove fixed for the bond to be furnished by it, which deposit shall be held by the Clerk in lieu of a bond and upon the same conditions as a bond. In the event the plaintiff or any of the intervenors shall fail to execute the bond or to give the security herein required of it within thirty (30) days from the entry of this order, this interlocutory injunction as to such plaintiff or intervenor so failing shall be thereupon immediately dissolved and shall afford no further protection herein to such plaintiff or intervenor. Upon the execution by the plaintiff or any one of the intervenors of a bond as herein provided or the making by any intervenor of a cash deposit with the Clerk as above provided, the bond heretofore executed by such plaintiff or intervenor in this cause shall be cancelled as

to all future liability and any deposit heretofore made shall be released as to any future liability.

Dated New Orleans, La., June 24, 1935.

(Original signed) Rufus E. Foster, Circuit Judge. Wayne G. Borah, District Judge. John McDuffie, District Judge.

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANTS TO ORIGINAL BILL OF COMPLAINT—FILED SEPTEMBER 18, 1935

Now into Court, through undersigned counsel, come Alice Lee Grosjean, Supervisor of Public Accounts of the State of Louisiana, and Gaston L. Porterie, Attorney General of the State of Louisiana, made defendants in the above numbered and entitled cause, and for answer to the bill of complaint filed in said suit, deny each and every allegation contained therein except those specifically admitted, and further answering show:

1

Defendants admit that the complainant, The Great Atlantic & Pacific Tea Company, is a corporation organized and existing under the laws of the State of Arizona, and is a citizen of that State, and that said complainant is doing business in the State of Louisiana. For lack of information on which to base a belief, all other allegations contained in Paragraph 1 of complainant's petition are denied.

2

It is admitted that Alice Lee Grosjean is the duly appointed and qualified and acting Supervisor of Public Accounts of the State of Louisiana, and, as such, is charged by Act 51 of the Legislature of Louisiana for the year 1934 [fol. 46] with the duty of collecting and enforcing the collection of taxes levied by said Act. It is further admitted that said defendant is a citizen of the State of Louisiana and her official residence as Supervisor of Public Accounts of the State of Louisiana is at Baton Rouge, in the Parish of East Baton Rouge, and is within the jurisdiction of the United States District Court for the Eastern District of Louisiana.

3

The allegations contained in Paragraph 3 of complainant's bill of complaint are admitted.

4

The allegations contained in Paragraph 4 are admitted.

5

Defendants admit the present suit is a civil suit, is of a civil nature in equity, and is brought for the purpose of attempting to enjoin the State of Louisiana from enforcing or attempting to enforce Act No. 51 of the Legislature of Louisiana for the year 1934. The title of said Act being statutory, the allegation with reference thereto contained in Paragraph 5 of complainant's bill need not be admitted or denied, the statute being the best evidence of its title.

6

It is admitted that complainant for more than ten years continuously last past has been engaged, and is now engaged, in the business of selling groceries, fruits, vegetables, poultry, meats, milk, butter, cheese, eggs and other foods, meats and dairy products commonly sold in grocery and meat stores. For lack of information upon which to base a belief, defendant denies all other allegations contained in Paragraph 6 of complainant's bill.

7

The allegations contained in Paragraph 7 of complainant's [fol. 47] bill are admitted.

8

It is admitted that complainant is a taxpayer in the State of Louisiana, paying license and property taxes. For lack of information upon which to base a belief, defendants deny the remaining allegations contained in Paragraph 8 of complainant's bill.

9

Defendants admit that prior to the enactment of Act 51 of the Louisiana Legislature of 1934, the tax imposed by the State of Louisiana upon chain stores was that provided by

Act 19 of the Louisiana Legislature of 1932. The remaining allegations contained in Paragraph 9 of complainant's bill, being merely allegations of the contents of the two aforementioned statutes, it is not necessary to either admit or deny same, the statutes being the best evidence of their contents.

10

For answer to Paragraph 10 of complainant's bill, defendants deny each and every allegation contained therein, except those allegations relating to the contents of Act 51 of the Louisiana Legislature for the year 1934, which said allegations are neither admitted nor denied for the reason that said Act of the Louisiana Legislature is the best evidence of the contents of same.

11

For answer to Paragraph 11 of complainant's bill, defendants admit that complainant operates upward of 15,082 stores in the United States and Canada, with 282 units in Canada. Defendants neither admit nor deny the remaining allegations contained in Paragraph 11 of complainant's bill for the reason that same are allegations of the contents of Act 51 of the Louisiana Legislature for the year 1934, and the contents of said Act is the best evidence of same.

[fol. 48]

12

For answer to the allegations contained in Paragraph 12 of complainant's bill, defendants deny each and every allegation contained therein, except those specifically admitted; further answering, defendants emphatically deny that, under the provisions of Act 51 of the Louisiana Legislature of 1934, a tax is levied on property outside the jurisdiction of the State of Louisiana; further answering, defendants show that the contents of said Act are best shown by the Act itself; further, that the rate of the tax levied by said Act is fixed by the total number of units or stores in the chain. Defendants further show that said Act 51 of 1934, because of the advantages accruing from the operation of multiple stores wherever situated, and because of the basic differences inherent in such character of operations, levies an annual license tax for the year 1935, and each subsequent year, upon each person, firm, partnership, cor-

poration or association of persons engaged in the business of operating, or maintaining, as part of a group or chain, any store or stores in this state, where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail under the same general management, supervision, ownership or control, commonly known as branch or chain stores. Defendants emphatically deny that the provisions of Act 51 of 1934 violate the provisions of the Constitution of the United States, especially the Fourteenth Amendment, by taxing property beyond its jurisdiction, and, on the contrary, show that, under the provisions of said statute, the tax involved is an excise, license or privilege tax, levied for the privilege of doing business in the State of Louisiana, and it is merely the rate of said tax that is fixed by the total number of units in the chain.

[fol. 49] 13

For answer to the allegations contained in Paragraph 13 of complainant's bill, defendants deny each and every allegation contained therein, except those expressly admitted; further answering, defendants emphatically deny that the tax levied by Act 51 of 1934, attacked herein, taxes property beyond the borders and jurisdiction of the State of Louisiana, and is arbitrary, but on the contrary is reasonable, for the reasons set forth elsewhere in this answer.

14

Defendants deny the allegations contained in Paragraph 14 of complainant's bill, except those specifically admitted; defendants especially deny that Act 51 of the Louisiana Legislature for the year 1934 establishes an arbitrary discrimination between those who operate a business in the State of Louisiana and also operate a business in other states and foreign countries, and those who operate a business only in the State of Louisiana; defendants further show that the differentiation in the tax levied by Act 51 of 1934 on retail units in Louisiana coming within the provisions of the Act, is fair, reasonable, just, and is based on a sound economic distinction, the Legislature of Louisiana recognizing, in the passage of said Act, the multiple differences existing in the character of operation of independent retail units and retail units being part of a chain or system, and

the multiple advantages accruing to those engaged in chain operation, and, further, the fact that the greater the chain or the greater the number of units in the chain, the greater the advantages accruing to the operators of the chain, especially in the matter of purchasing power, low cost distribution, advertising, concessions and discounts given multiple unit operators by manufacturers and wholesalers, the ability of the multiple unit operators to purchase direct from the manufacturer, thereby eliminating the cost involved in [fol. 50] purchasing from wholesalers, and the many other advantages accruing to operators of multiple retail units, and these advantages increase as the number of units increase, in other words, the tremendous purchasing power and other advantages created by the entire system of units, wherever situated, is literally "dumped" into Louisiana and is behind each unit of said system operated within the borders of the State of Louisiana to compete with the local independent retailer or operator of a small number of retail units; further answering, defendants show that the provisions of Act 51 of 1934, attacked herein, are just, reasonable, and bear a reasonable relationship to the end the Legislature had in view at the time of the passage of said Act; further answering, defendants show that it was the intent and purpose of the Legislature of Louisiana to recognize the differences set forth in this paragraph in the matter of operation and advantages accruing to the operators of multiple retail units, and to levy an excise, license or privilege tax for the privilege of exercising in Louisiana the many advantages, especially the tremendous purchasing power, created by the multiple units, and seeking to some extent to place the independent retailer and the small chain operator, through taxation, on a parity with those operating a vast number of units backed by unlimited capital, and in so doing, to protect the citizens of Louisiana and to promote their general welfare.

Defendants especially deny that Act 51 of the Louisiana Legislature of 1934 denies the complainant herein, and those similarly situated, equal protection of the law and takes their property without due process of law.

15

For answer to the allegations contained in Paragraph 15 of complainant's bill, defendants deny each and every allegation contained therein, with the exception of those

[fol. 51] allegations of the contents of Act 51 of the Louisiana Legislature of 1934, which allegations are neither admitted nor denied, for the reason that the statute itself is the best evidence of its contents; further answering, defendants especially deny that the increase in the size of a chain beyond a certain point has no tendency to increase the value of the units of the chain, and aver that the greater the number of units in a chain or system, the greater the purchasing power, the greater the advantages accruing to the entire system and to each individual unit, the greater the ability to further expand, and the greater the other advantages accruing to the entire system, which is enjoyed by each individual unit, as set forth elsewhere in this answer.

16

Defendants deny the allegations contained in Paragraph 16 of complainant's bill, except those specifically admitted, and especially deny that the tax levied by Act 51 of the Louisiana Legislature of 1934 is arbitrary, confiscatory and prohibitory; further answering, defendants deny that the provisions of said statute deprive the complainant, and others similarly situated, of their property without due process of law.

17

Answering the allegations contained in Paragraph 17 of complainant's bill, defendants deny each and every allegation contained therein, except those specifically admitted; further answering, defendants show, for the reasons set forth elsewhere in this answer, the contents of Act 51 of 1934, attacked herein, has a very important bearing on the public welfare of the citizens of the State of Louisiana, and has an indirect bearing on the public health, the public morals, and the police power of the state.

Further answering, defendants show that Act 51 of 1934 is not prohibitory, is not arbitrary, and does not unreasonably discriminate against the complainant and other tax-[fol. 52] payers similarly situated, and that the provisions of said statute fully comply with the requirements of both the State and Federal Constitutions.

18

Answering the allegations contained in Paragraph 18 of complainant's bill, defendants deny each and every allega-

tion contained therein, except those specifically admitted. Further answering, defendants show that Act 51 of the Louisiana Legislature of 1934 does not violate the provisions of the Constitution of the United States, Amendment Fourteen, Section One, by depriving complainant of its property without due process of law and by denying complainant equal protection of the laws.

(a) Defendants emphatically deny that said Act undertakes to tax property beyond the jurisdiction of the State of Louisiana.

(b) Defendants deny, for the reasons set forth in this answer, that said Act discriminates without justification between the complainant and others operating under similar circumstances in the State of Louisiana.

(c) Defendants deny that there is no basis for the classification fixed by said Act, and further show that said classification is not unjust, is not oppressive, is not unreasonable, and is not arbitrary, and for the reasons set forth in this answer, the difference in the tax levied by said Act bears a real and substantial relation to the end the Legislature had in view at the time of its enactment.

Defendants deny that said Act violates the provisions of Article 1 of the Constitution of Louisiana for the year 1921, particularly Sections 2 and 6 thereof.

Defendants further deny that said Act violates the provisions of Article 1, Section 8, sub-division 3 of the Constitution of the United States.

19

Answering the allegations contained in Paragraph 19 of [fol. 53] complainant's bill, defendants neither admit nor deny said allegations for the reason that said allegations are of the contents of Act 51 of 1934, and the best evidence of the contents of said Act is the Act itself.

20

The allegations contained in Paragraph 20 of complainant's bill are expressly denied, except those admitted; further answering, defendants emphatically deny that Act 51 of 1934 is unconstitutional and that complainant is without a plain and adequate remedy at law in both the courts of Louisiana and of the United States.

21

Answering the allegations contained in Paragraph 21 of complainant's bill, defendants deny all allegations contained therein, except those specifically admitted; further answering, defendants admit that complainant tendered the amount of tax that would have been due the State of Louisiana under Act 19 of the Louisiana Legislature for the year 1932, had it not been repealed by Act 51 of 1934, involved in this litigation, and that the Supervisor of Public Accounts declined to accept such tender.

22

For lack of information upon which to base a belief, defendants deny the allegations contained in Paragraph 22 of complainant's bill.

[fol. 54]

23

Defendant further shows that during the period of 1913-28 and to the present time, there has been a marked increase in the number of chain stores in operation in Louisiana and in the United States; that each succeeding year the number of chain stores materially increases, and that said increase extends, without exception, to the entire United States.

24

Defendant shows that in 1929 in the United States there were One Million, Five Hundred Forty-three Thousand, One Hundred Fifty-eight (1,543,158) retail stores with a total sales of Forty-nine Billion, One Hundred Fourteen Million, Five Hundred Thirty-two Thousand, Two Hundred sixty-nine ($49,114,532,269) Dollars; further, that this number included Seven Thousand and Sixty-one (7,061) chain store organizations operating One Hundred Fifty-nine Thousand, Six Hundred Thirty-eight (159,638) stores, or about ten (10%) per cent of all the retail stores in the United States; further answering, defendant shows that the sales of these chains aggregate Ten Billion, Seven Hundred Forty Million, Three Hundred Eighty-five Thousand, Two Hundred and Eight ($10,740,385,208.) Dollars, or about twenty-two (22%) per cent of the total retail sales in the United States.

25

Defendant further shows that, in the United States, during the period 1919-28, the *opening* rate of independent

stores was substantially higher than that for stores of chains; that the independent *closing* rate was practically as high as its opening rate; further, that the chain rate of closings is approximately one-fourth of their openings.

26

Defendant further shows that it is the practice of chain organizations to concentrate their stores first in the most populous or most densely settled seetions or communities, [fol. 55] and extend operations to the less populous localities, from time to time fortifying their competitive position in the locality penetrated earlier by adding new stores there as well.

27

Defendant further shows that the three largest National grocery chains in the world are; first, The Great Atlantic & Pacific Tea Company, complainant in this suit, the Kroeger Grocery and Baking Company, and the Safeway Stores, Incorporated; that these three chains operated during 1930 nearly Twenty-five Thousand (25,000) retail grocery stores with aggregate sales of almost One Billion, Six Hundred Million ($1,600,000,000.) Dollars. That The Great Atlantic & Pacific Tea Company, complainant herein, alone operated Fifteen Thousand Seven Hundred Thirty-eight (15,738) of these stores, with total sales during 1930 of One Billion, Sixty-five Million ($1,065,000,000.) Dollars. Defendant further shows that the significance of these figures is heightened by the tendency of chain stores to increase at a faster rate than independents.

28

Defendent further shows that the tremendous and rapid growth of the chain stores in Louisiana and the United States is the result of the enormous expansive power of their organization being in a position to enter new fields and new territories with new stores, and operate them at a loss, which loss is offset by stores already established in other communities, and other states, and thus permit the establishment of new stores in communities and new fields much more successfully than an independent or small chain entering new fields. Defendant further shows that The Great Atlantic & Pacific Tea Company, complainant herein, is the

largest retail dealer in the world, and has built up its tremendous chain of stores throughout the United States to its present lines by opening new stores. Further, when the complainant herein enters a new field or territory, because [fol. 56] of its great ramifications and enormous assets behind the new venture, it can operate the stores newly opened at a loss, and sell for less than its competitors in said new fields, and carry said loss successfully and without injury to its financial structure by increasing the profits in stores already established in other sections of the United States, until the new unit or units are established.

29

Defendant further shows that, in addition to opening new stores, chains expand by acquisition of independently owned stores and by acquisition of stocks, and stores of smaller chains, and by consolidation.

30

Defendant, further answering, shows, that the Great Atlantic & Pacific Tea Company, complainant herein, built up its chain of over 15,000 retail grocery stores almost entirely by opening new stores, and availing itself of the numerous advantages afforded a sectional or national chain by using the established portion of the chain to carry any losses experienced by newly established units until said newly established units are placed on a profitable basis; defendant further shows, however, that numerous acquisitions were made by The Great Atlantic & Pacific Tea Company by purchasing capital stock of other chains; said company acquired in 1925 the capital stock of Quaker Maid, Inc., which operated a chain of grocery stores in Kentucky and Southern Indiana.

31

Defendant further shows that the Kroger Grocery & Baking Company, with headquarters in Cincinnati, Ohio, was organized in 1902 with an initial chain of 40 retail grocery stores. Since 1902, said company has added 4,647 [fol. 57] stores by openings, and 2,245 stores by acquisition, and is now the second largest grocery chain in the United States; that complainant and Kroger Grocery and Baking Company continue to expand at a rapid rate enjoying the

advantages accruing in the operations of multiple stores, as set forth herein.

32

Defendants further show that, by reason of its size, and the great number of retail units established, The Great Atlantic & Pacific Tea Company, complainant herein, has developed its own brokerage organizations for the purpose of purchasing fruit, vegetables, and other commodities. That during the interval from 1922 to 1928, and to date, an appreciable decrease took place in the dependence of chains upon the services of wholesalers, brokers, and commission men. Further, that the chains, during said period, began to purchase direct from manufacturers, leaving out the wholesalers, brokers, and commission men, thereby obtaining better prices and purchases than the smaller chains and independents, and the greater the number of units in a chain, the greater the advantages afforded by purchasing directly from the manufacturer and omitting the wholesaler, the broker and the commission man.

33

Defendants further show that in the case of The Great Atlantic & Pacific Tea Company, complainant herein, in most instances, the seller of vegetables, fruits and other produce, are required to pay the usual brokerage fee to the brokerage organization set up and owned by The Great Atlantic & Pacific Tea Company, which brokerage fee inures to the profit and benefit of The Great Atlantic & Pacific Tea Company, and results in a lower purchasing price of the respective commodities, which advantage is enjoyed by the complainant by reason of its size and great number of units, and is not enjoyed by the smaller chains and independents, in other words, the greater the number of units, the greater the opportunity afforded the chain to indulge in such practices.

[fol. 58] 34

Defendants further show that during the period from 1922 to 1928, chains operating two to five stores in the meat and grocery lines, purchased 27% of their products from manufacturers direct, while chains operating more than

1,000 stores in the same line of business purchased 66% from that source. Further, that the drug and tobacco chains of smaller size buy less than 40% from manufacturers, while the larger chains in these groups buy 95% from that source. Defendants further show that the proportion purchased from manufacturers increases with an increase in the size of the chain, and there is a corresponding decrease in the proportion supplied by wholesalers.

35

Defendants further show that The Great Atlantic & Pacific Tea Company, by reason of its enormous size, engages in the manufacture of commodities in both wholesale and retail trade, thus enjoying an additional advantage by reason of the operation of multiple stores, the greater the number of units, the greater the advantage.

36

Defendants further show that the size of a chain organization, as determined by the Federal Trade Commission, is measured by the number of stores operated by the chain.

37

Defendants further show that the greater the number of units in a chain, the greater the opportunities afforded to engage in the manufacture of articles and the greater the opportunities to engage in both the wholesale and retail trade.

38

Defendants further show that chain organizations conduct their wholesale and retail operations through the same [fol. 59] company, and, therefore, enjoy the economies realized from the operation of the two types of business under the same management.

39

Defendants further show that it is the policy of chain organizations to supply all the multiple units by a central buying unit, purchasing merchandise in the several states and in foreign countries in trainloads and cargo lots, thereby enjoying, by reason of the great number of units

operated, a distinct advantage in purchasing power over the smaller chains and independent merchants.

40

Defendants further show that a great many of the larger chains manufacture part of the commodities sold in their retail units, and the larger the number of retail units, the greater the opportunity afforded the chain organization to manufacture its own commodities, and the greater the profits from said endeavor. Defendants further show that some chains sell part of their manufactured articles at wholesale to other dealers; defendants further show that by engaging in manufacturing of commodities and the retail distribution and sale of same in one chain organization affords the chain greater earnings than the smaller chain that does not have sufficient volume to warrant engaging in the manufacture of commodities it retails.

41

Defendants further show that the larger the number of units in a chain, the greater the opportunity afforded the chain organization to maintain warehouses in centrally located places where its merchandise can be stored until needed by its various units, and can be shifted from the warehouse to the various units and back to the warehouse for storage if the respective commodity is a slow mover, or can be shifted from one unit to another unit, with more profitable results; defendants further show that from these warehouses, which form the bases of supply, the chains also sell at wholesale to other dealers.

[fol. 60]

42

Defendants further show that the larger the number of units in a chain, the larger the purchases, and the greater the requirement for commodities, with the result that the greater the number of units in a chain, the greater the purchasing power of the chain; that the greater the purchasing power, the greater the opportunities to obtain concessions from the manufacturers and wholesalers, resulting in cheaper prices to said larger chains.

43

Defendants further show that the larger the number of units in a chain, the greater opportunity afforded the or-

ganization to establish purchasing agencies in foreign countries at the base of supply of foreign grown or manufactured commodities or articles, resulting in the ability to import said merchandise cheaper than those organizations of insufficient size to warrant maintaining foreign purchasing agencies; defendants further show that warehouses maintained by the larger chains are used extensively in storing foreign-bought goods, bought through said foreign buying agencies, until needed by their retailing units.

44

Defendants further show that in 1928, 19.3% of the aggregate retail sales of the United States were made by chain stores.

45

Defendants further show that the ability of the chain store, by reason of its large number of units, to obtain its goods at lower costs than independents, and of the larger chains to obtain goods at lower costs than smaller chains, is an outstanding feature of the growth and development of chain store merchandising, and is the direct cause of the enormous growth of chains.

46

Defendants further show that the lower costs referred to [fol. 61] in the preceding paragraph have frequently found expression in the form of special discounts, concessions, or collateral privilege which are not available to smaller chains and independent operators; that chain stores use threats and coercion in obtaining lower prices from manufacturers. Said threats consist of chain store statements or intimations to the manufacturer that, unless the concessions sought are granted, the chain will enter upon the manufacture of the goods itself, buy them from some other source than the seller with whom it is negotiating, or will discourage the sale of his products; this power accruing to the advantage of large chains, and the greater the number of units, the greater the power, is not enjoyed by the independent retailer or merchant, or by the small chain operator.

47

Defendants further show that a vivid idea of the enormous bargaining power embodied in chain store purchases

may be gained from the fact that The Great Atlantic & Pacific Tea Company, complainant herein, makes purchases of merchandise amounting to over $800,000,000.00 annually, and other large chains make purchases in proportionate amounts, in other words, the greater the number of units in a chain, the greater the amount of the purchases, the greater the bargaining power, and the greater the advantages accruing to the chain by reason of the enormous purchasing power; each unit, irrespective of location, whether in Louisiana or elsewhere, contributes just as much to the total purchasing power as if all units were located in Louisiana; every unit in the chain or system contributes to the power of the central purchasing agent of the chain or system, and each unit, wherever situated, is backed by this purchasing power created by the total number of units in the system; in other words, each unit of a chain in Louisiana enjoys the tremendous purchasing power created by [fol. 62] the whole chain, and all the units wherever situated, and by reason of being a unit in said chain or system, it has advantages, as set forth herein, not enjoyed by smaller chains and independent merchants.

48

Defendants further show that the Federal Trade Commission, in its report on its investigation of chain stores made to the United States Senate, contained in Senate Document No. 4, 74th Congress, First Session, reported that of 129 manufacturers in the grocery group interviewed, 76 admitted preferential treatments given chain stores; that 33 of said manufacturers positively stated that threats and coercion measures had been used by chain store companies to obtain preferential treatment. Defendants further show that out of the thirty-three instances reported by the Federal Trade Commission where threats and coercion measures were employed, in twenty-three cases such threats and coercion resulted in securing the concession demanded from the manufacturer. Further, that among the concessions demanded by chains, as shown by the investigation of the Federal Trade Commission, are brokerage fees, freight allowances, lower prices, etc., and that those manufacturers meeting the demands of chain stores did so for the purpose of obtaining the business.

49

Defendants further show that the larger the number of units in a chain, the greater the opportunity afforded the organization to employ full-time, skilled buyers, who study the various markets, and, because of their keen knowledge of marketing, buy successfully under list prices. For example, because of the size of the chain, and the advantages accruing thereby, it will frequently play the market of one state against the market of another, with threats that if the price at which goods can be obtained from the other state is not met, the manufacturer will not obtain the business. Defendants further show that smaller chains and independents, by reason of their lack of size, are unable to [fol. 63] feel the pulse of the market in this way and are unable to secure this preferential treatment.

50

Defendants further show that of eighty-eight manufacturers in the drug groups interviewed by the Federal Trade Commission, in the aforementioned report, thirty-six admitted price preferences to chain stores; of twenty-six tobacco manufacturers interviewed, sixteen admitted preference to chain stores, such as extra discounts, rebates, and other allowances.

51

Defendants further show that, The Great Atlantic & Pacific Tea Company, purchases nationally known trademarked and nationally advertised goods through the purchasing office in New York City. Under the direction of the vice-president in charge of the central purchasing office, buying offices are also maintained for direct buying of merchandise produced or packed in the following market centers: Minneapolis, Rochester, Seattle, San Francisco, New Orleans, Milwaukee, Baltimore, New York, Chicago. and Boston. Some of these were originally conducted as independent brokerage offices, the brokers buying largely for The Great Atlantic & Pacific Tea Company. They are now, however, a part of The Great Atlantic & Pacific Tea Company organization and the heads of the several offices, in some instances the former brokers, are now salaried employees of the company. On practically all purchases a brokerage, or a discount in lieu of brokerage, is collected,

and inures to the benefit of The Great Atlantic & Pacific Tea Company. Many manufacturers have been unable to sell to The Great Atlantic & Pacific Tea Company because they would not allow brokerage, and others, have been able to sell the company only because they were allowed brokerage. The purchases of these offices for the year 1932 are reported as amounting to approximately $255,000.00-. The brokerage is equivalent to the prevailing brokerage in the various markets.

[fol. 64] 52

Defendants further show that, for the purpose of obtaining its supply of produce, The Great Atlantic & Pacific Tea Company, as parent company, operates the Atlantic Commission Company a 100 per cent owned subsidiary. Approximately 70 per cent of the produce handled by the Atlantic Commission Company is delivered to The Great Atlantic & Pacific Tea Company, retail stores, the remaining 30 per cent being sold to other distributors. Its reported total sales for 1931 were approximately $71,000,000. The company collects a commission or brokerage on all produce handled, both that which is purchased for the parent company and that sold to others.

The company maintains a field force of some seventy-five representatives who cover the large producing areas.

For the most part, the company contracts in advance for the produce it is to handle. In 1933 it had agreements with something over two hundred shippers. The general form of contract provides for the appointment of the Atlantic Commission Company, Incorporated, as 'exclusive marketing agent to handle the sale and distribution of the entire shipments of fruits and vegetables owned, controlled, or otherwise handled by the shipper for and during' a designated season. With the larger shipping organizations formal written contracts are ordinarily not entered into, but the terms of agreement are fixed by correspondence or are oral. Many of these larger contracts require exclusive dealing, and others give to the Atlantic Commission Company certain exclusive distribution territory.

53

Defendants further show that The Atlantic Commission Company, now a subsidiary of the Great Atlantic & Pa-

cific Tea Company, organized in 1925, entered the Eastern Shore of Virginia produce field in 1926, purchasing and contracting individually; that in 1929 or 1930, the Eastern Shore division of the United Acceptance Corporation came [fol. 65] into this market. It made advances to growers and so controlled the sale of their products. Under contract the Acceptance Corporation marketed the production it controlled through the Atlantic Commission Company.

In January 1932, by an arrangement between the Eastern Shore of Virginia Produce Exchange, a cooperative marketing association, The Atlantic Commission Company and the Eastern Shore division of the United Acceptance Corporation, the Produce Exchange took over the business of the Acceptance Corporation. Under contract the Atlantic Commission Company agreed to make all its purchases of Eastern Shore produce from the Produce Exchange; the latter in turn agreed to supply the Atlantic Commission Company with such Eastern Shore produce as the Atlantic Commission Company might be able to sell, giving to it exclusive selling rights in some cities and in others the joint right to sell, the Exchange retaining its agency or brokerage representatives in such cities. The Atlantic Commission Company, through the United Acceptance Corporation, and the Eastern Shore of Virginia Produce Exchange were, prior to this arrangement, the strongest competitors for the handling of the produce of this field. In 1932 the Eastern Shore of Virginia Produce Exchange handled the following percentages of production of the Eastern Shore section: Strawberries 70 per cent, cabbage 60 per cent, onions 65 per cent, Irish potatoes 57 per cent, sweet potatoes 65 per cent; that the foregoing further demonstrates the advantages in purchasing power created by the great number of retail units in the chain operated by complainant.

54

Defendants further show that chain stores sell at prices which are lower than prices charged by independent retailers or even co-operative chains; that chain store prices on comparable Standard brand merchandise average substantially lower than those of independent retailers.

55

Defendants further show that the most important pro- [fol. 66] tection from the effects of direct price competi-

tion is the development by chain stores of their own private brands. To avoid meeting competition, chain organizations at times seek the co-operation of manufacturers to force competitors to cease undesirable price cutting; this may take the form of getting lower prices or merchandise from the manufacturers, obtaining special kinds of merchandise for the occasion, or it may take the form of a threat by the chain to buy elsewhere, if the price cutting on the manufacturer's goods is not stopped. Defendants further show that chains meet and beat competition irrespective of what conditions may arise.

56

Defendants further show that a competitive advantage of chains over single competitors, which advantage increases with the number of units in the chain, arises from the fact that chains do business in many localities, so that to meet and beat competition in any specific locality, the chain is in a position to cut prices, even below the cost of the product where competition is keen, and offset the loss in other localities where competition is not so keen, and where the chain has already established a monopoly. Further, that it is the practice of chain organizations to cut prices locally, not only to meet, but to go below, prices of their competitors.

57

Defendants further show that one of the very important advantages of chain store organizations is the possibility of varying the prices charged not only within the same city, but also as between different cities in the same section, or between different sections, in order to take full advantage of local conditions by charging what the traffic and competition will bear. The chain has an inherent advantage over the average retailer in price competition because the chain is able to average the profit results obtained [fol. 67] from its stores in various localities, the low price in one or more localities being offset by the higher prices obtained at other points. This strategic advantage is greatest, of course, to the large chain over the independent retailer, but it also applies in a less degree to the large chain as compared with small chains.

58

Defendants show that it is between the chains and independent retailers that the averaging process set out in this

preceding paragraph is most significant, the essence of the process being the opportunity it affords the large chain to derive profits from one group of stores which may be used either offensively or defensively for price-cutting warfare on other chain or independent retailers. All the resources represented by the profits of other stores may be thus utilized by the chain for price-cutting in any particular locality; It is true that the wide-spread operation of the large chains make- it necessary that such chains meet competitive prices at a very large number of points but this is not in any sense an offset to the advantage which such chains derive from the averaging process. Although an independent or small chain competitor may encounter a condition of severe price competition less frequently than a large chain, this price-cutting is of relatively greater significance to him because it affects the total business of the independent and frequently the smaller chain also, and thus bears more heavily upon the smaller than upon the larger competitors. None of these local price-cutting encounters, nor perhaps all of them together, will effect so large a proportion of the total business of the large chain as that of the independent or small chain competitors involved. The ability of the larger chain thus to average its prices and profits, gives this type of organization another very important advantage in its ability to use leaders and loss leaders more effectively.

[fol. 68] 59

Defendants further show that the extent to which prices are cut by chain stores depends upon competition.

60

Defendants further show that chain stores use "loss leaders" for the purpose of obtaining trade. Usually the total loss incurred in the sale of these articles is borne by the manufacturer, the chain obtaining a reduction in the price from the manufacturer, therefore the chain takes no loss, and derives the benefit of attracting trade through reduced prices of the leader. This advantage is enjoyed by the larger chains, and the larger the chain the greater the opportunity of obtaining this concession from the manufacturer.

61

Defendants further show that the larger the number of units in a chain, the greater the opportunity afforded the organization to market its private brands, that is, merchandise under their own label; that greater profit is usually made on this type of merchandise. Defendants aver the advantage of private labeled merchandise to the chain store is indicated by the fact that all of the large grocery co-operative chains, including the complainant, has developed such lines of merchandising.

62

Defendants further show that chain store advertising, which is predominantly newspaper advertising, is an important factor in the growth of chain organizations and is one of the chief advantages which independents cannot employ, except to a limited degree. That independent retailers are placed at a competitive disadvantage by the extensive newspaper advertising done by large chains in their respective fields. Independent dealers cannot compete successfully with the chains in newspaper advertising. Fur- [fol. 69] ther, chain stores advertise more extensively than independents and there is a generally consistent downward tendency in the ratios of advertising expenditures to sales with increases in the size of the chains. A given outlay for advertising will often serve a large number of stores as well as a few.

63

Defendants further show that, according to the report of the Federal Trade Commission, referred to herein, a consumer is more likely to get short weights in a chain store than in an independent store, and is more likely to get excess weights in the latter than in the former establishment.

64

Defendants further show that it is the manufacturers' recognition that the chain, with its tremendous purchasing and distributing power, may carry out the threats made in order to obtain concessions in prices, and not the threats themselves, that is the real inducement for granting special concessions.

65

Defendants further show that, according to the report made to the United States Senate, by the Federal Trade Commission, in Senate Document No. 4, 74th Congress, First Session, at pages 49 and 50 of said document, the position and policy of The Great Atlantic & Pacific Tea Company, complainant in this suit, with regard to its brokerage and commission business presents the legal problem of chain store relationship to such business in its most aggravated form; that it raises the question of whether a concern of such enormous buying and distributing power may further enlarge that power by setting up buying agencies which in effect give it special concessions from producers, and, may thereby obtain advantages over independent retailers who buy through independent buying agencies and at the same time compete with those independent agencies for the trade of its own retail establishments.

66

Defendants further show that it is the policy of chain [fol. 70] organizations to under-sell all competitors.

67

Defendants further show that the ability of chain stores to vary prices among their different branches and thus to average their profit results in one of their chief advantages over independents and smaller chains. In other words, it is one of the chief elements in the growth of chain store systems to their present dimensions and there is no ground for expecting a different effect upon their future growth. This means that chain store systems will probably continue to increase in size and tend more and more toward a monopolistic position.

[fol. 71]

68

Defendants further show that the reason chain stores retail at lower prices than the smaller chains and independents is attributable to lower buying prices, and that lower buying prices are attributable to the relative size of the chain, in other words, the greater the number of units in a chain, the greater the purchasing power.

69

Defendants further show that the manufacturers make greater and more allowances and more discounts to chains than said manufacturers do to wholesalers, this being due to the enormous purchasing power created by the greater number of units in the chain.

70

Defendants further show that the discriminations made by manufacturers in favor of chain stores, and the greater the volume of purchases, the greater the discriminations, enables the chain to under-sell independent competitors, and substantially lessens competition between the chain operator and the independent merchant and tends to create a monopoly.

71

Defendants further show that price discrimination as practiced by the manufacturers in favor of the large chains, and against the smaller chains and individuals, is one method used to build a monopoly.

72

Defendants further show that chain store operators purchase goods cheaper and have a lower cost of distribution; that the greater the number of units in a chain, the greater the ability to purchase at lower costs, and the lower the cost of distribution.

73

Defendants further show that there has been wide recognition of the economic problem involved in the growth and [fol. 72] threatened domination involved in chain distribution which is one phase in the problem of monopoly.

74

Defendants further show that the real issue in chain store expansion is both social and economic and that states, through legislation, have sought to restore to the independent merchant and smaller chain the equality of opportunity by subjecting the chain store, whose operations are imperiling those opportunities, to the burden of graduated license fees.

75

Defendants further show that the main purpose of graduated taxes on chain stores is to protect the independent merchant and smaller chains, and offset the advantages of the multiple store operator by heavier taxation.

76

Defendants further show that a statute taxing chains, with the rate fixed by the number of stores in the state, is unfair to the independent retailer and to the smaller chains for the reason that such a statute does not take into consideration the superior ability of the larger chains to absorb the tax by reason of operating nationally as well as locally. Thus, such a tax places the local chain operator at a competitive disadvantage, since the national chain can spread the tax imposed upon its local units over its many stores locally, as well as nationally, thereby reducing to a negligible amount the tax expense to each of its local units, or it can allow its local units to absorb the tax themselves, the resultant decrease in profits being recoverable by the companies charging higher prices for commodities in stores located in other territory where the competition is not so intense.

77

Defendants further show that in a competitive field made up of numerous, more or less isolated competitive units, the [fol. 73] retailer who operates a large number of stores situated throughout a wide area enjoys a strategic advantage over a competing retailer who operates fewer stores, or whose stores are confined to a more limited area. Such strategic advantage of the large chain is greatest, of course, in competition with the independent retailers who operate only one store. The source of this advantage lies in the fact that the multiple store retailer has the opportunity of averaging the profit results obtained from its stores in several localities, where it operates, if the store in one locality is operating under severe competitive conditions and producing a net loss, its losses may be, and under normal business conditions probably would be, offset by the profits earned in other stores. To illustrate the advantage of the averaging process to the large chain, it may be assumed that in a given locality the number of chain and in-

dependent stores attempting to do business is greater than the demand in the community can profitably support. Should one of the independent retailers, or one of the local chains, initiate price cuts in an effort to obtain what business is available, the large chains are put upon the defensive in that locality. It is obvious that they can meet the reduced prices of their competitors and continue the operation of their stores in that locality almost indefinitely if they are operating stores in other localities, where competition is less vigorous. The profits obtained from those other stores will enable the larger chains to survive the price warfare in that particular community for a longer period than the local competitor.

78

Defendants further show that one purpose of the Act herein attacked is to aid the independent retail and small chain operators, the tax rate being fixed by the total number of stores in the chain, therefore, the greater the chain, the greater the advantage enjoyed thereby, and the greater the rate of tax.

[fol. 74] 79

Defendents further show that the following are some of the advantages enjoyed by chain stores over the independent merchants and smaller chains, these advantages bearing a definite ratio upward in proportion to the amount of business done, which is gauged by the total number of units in the chain:

1. Lower buying prices, which often is the result of special discounts and allowances made to chains.

2. Ability of chains to use "leaders" sold below cost, and recoup losses in other stores.

3. More extensive short and less extensive overweighing by chain stores in some localities than by independent stores on commodities sold by weight.

4. Less service given customers by chains as compared with independents.

5 Lower wages paid by chains.

6. Elimination by the chains of most of the wholesale selling expenses commonly involved in retail system of distribution.

7. Wider profit margins on chain store purchased and especially manufactured private-brand merchandise as compared with standard brands.

8. Cheaper newspaper advertising and more extensive.

9. Ability of chains to average the profits in various stores.

80

Defendants further show that The Great Atlantic & Pacific Tea Company, complainant herein, has literally "dumped" into Louisiana the enormous purchasing power created by the total number of units in the entire chain, which enormous purchasing power is used in Louisiana in competition with smaller chains and independent merchants; that each and every unit owned and operated by The Great Atlantic & Pacific Tea Company, being retail [fol. 75] units selling the same general type of merchandise, contributes to the purchasing power of said chain as much so as if said unit was situated within the borders of the State of Louisiana; that the units operated by said chain in the States of Texas, Arkansas, Oklahoma, Mississippi, Alabama and other states of the Union directly contribute to the purchasing power of said enormous organization, which purchasing power is used for the benefit of the retailing units situated within the borders of the State of Louisiana, and the fact that the territory making up the United States of America is divided into states, and has state lines, makes no difference in the contribution of each unit toward the ultimate enormous purchasing power enjoyed by the entire chain.

81

Defendants further show that the Legislature of Louisiana, by enacting the statute herein attacked, is seeking to protect and better the citizens of the State of Louisiana in encouraging the operation of independent businesses with independent capital for the reason that it is the opinion of the Legislature of Louisiana that a person makes a better citizen if he is permitted to operate an independent business rather than be subservient to an enormous financial structure in which he has no voice.

82

For the reasons set forth in this answer, defendants aver that the method of arriving at the rate of tax set forth in

the statute herein attacked by complainant is the fairest and most equitable method of arriving at a rate, and that the rate of the tax set forth in said Act has a real and substantial relation to the end the Legislature had in view at the time said statute was enacted.

83

Defendants further show that the upward of 15,000 units [fol. 76] operated by The Great Atlantic & Pacific Tea Company throughout the United States and Canada directly contribute to and increase the value of each unit owned and operated by The Great Atlantic & Pacific Tea Company within the borders of the State of Louisiana, and directly contribute to and add to the value of the privilege of doing business for each unit in the State of Louisiana.

84

Defendants further show that chain stores, by reason of their size and great number of distributing units, are in a position to sell commodities at retail for a price that the commodities cost the independent retailer and small chain operator, and yet make an enormous profit and pay large dividends on its stock, both common and preferred, out of rebates, discounts, allowances and concessions of various and sundry kinds, that the larger the chain the greater the ability to engage in this practice.

85

Defendants further show that in the cities of Shreveport, Monroe, Alexandria, Baton Rouge, Lake Charles and New Orleans, chain stores have rapidly increased in number and driven out of business the independent merchant and smaller chain orerator, and this condition continues to exist and creates, in the opinion of the Legislature of Louisiana, an unhealthly and undesirable situation in that it has driven out of business independent merchants who have long supported the public institutions of the State of Louisiana and have been the supporting citizens of the respective towns and cities named, and it is this condition that the Legislature seeks to remedy through the statute herein attacked.

86

Defendants further show that the chain stores are rapidly extending their operations into the smaller cities, towns

[fol. 77] and villages, and if the present rate of expansion continues, chain stores will have, in the course of time, a monopoly on the retail trade in Louisiana.

87

Defendants further show that the national chains fail to support Louisiana banks and Louisiana institutions and threaten to gain a monopoly on the retail trade in Louisiana, and in fact, the whole United States. The defendents further show that the larger the number of units in a chain, the greater the capital employed, the greater the ramifications, the greater the purchasing power, and the greater the tendency towards monopoly and, therefore, the greater the menace toward society, and the greater the tendency to break down the initiative and independence of the citizens of Louisiana.

88

Defendants further show that an official of the Great Atlantic and Pacific Tea Company, complainant in the case at bar, filed with the Special Committee of the National House of Representatives, investigating the American Retail Federation, between June 5 and July 10, 1935, an affidavit showing brokerage allowances, extra quantity discounts, and advertising allowances received from manufacturers by the Great Atlantic and Pacific Tea Company, complainant herein, together with the names of the manufacturers and the commodities purchased from each. Defendants further show that said list, in affidavit form, which follows, is true and correct and shows some of the concessions given the complainant herein, because of the great number of units operated by complainant, which gives [fol. 78] it its tremendous purchasing power, which concessions are not enjoyed by independent retailers and smaller chains. Said list follows:

Airy Fairy Foods, cake flour, 5-per cent advertising allowance.

Alabama-Georgia Syrup, sirup, 15-cent case flat and quantity per cent included.

Alaska Packing Co., salmon, 5-per cent advertising allowance.

Alexander & Baldwin, pineapple, 5-per cent advertising allowance.

American Ammone, ammo, 10-per cent advertising allowance.

American Chicle, gum, 20-per cent advertising allowance.

American Diamalt, malt sirup, 35 cents case on quantity scale.

American Molasses Co., molasses, quantity scale 1-5 per cent.

American Pop Corn, pop corn, 5-per cent advertising allowance.

Andrea Process, onion salt, 10-per cent advertising allowance.

Angelus-Campfire, marshmallows, quantity scale 3-5 per cent.

A. P. W. Paper, toilet paper, $100 per month flat *per cent* advertising allowance.

Arbuckle Bros., Yukon coffee, $200 per month flat and 5 per cent additional.

-rmour & Co., regular line, 3 to 7 per cent on canned meats advertising allowance; fresh meats, one-half per cent quantity allowance if purchases total $10,000,000.

Atlantis Sales Co., line, quantity scale 5-7 per cent.

Atmore & Son, line, 8-per cent advertising allowance.

B. T. Babbitt, line, quantity scale 15-80 cents per case. 7,500-17,500 (case).

Baker-Bennett-Day, nuts, 5-per cent advertising allowance.

Baker Food Products, canned meats, 5 per cent for brokerage.

Ball Bros., general support, payment at end, advertising allowance.

Barron-Gray, fruit cocktail, 5-per cent brokerage.

Battle Creek Food, line, 5-per cent advertising allowance.

Beechnut Packing, bacon, coffee, biscuit, quantity scale 7 per cent for over $200,000; candy, gum, $7,000 per month flat advertising allowance; line, $10,000 per year flat advertising allowance.

Bell, Wm. G., seasoning, quantity, 5 per cent for 30,000 dozen over.

Berst-Foster-Dixfield, toothpicks, 3-per cent advertising allowance.

Best Foods, Nucoa, quantity scale, 0-1c per pound, 2-10 million pounds; B. B. pickles, 5-per cent advertising allowance and quantity; mayonnaise, 5-per cent advertising allowance.

Beyer, W. L., dog food, 5-per cent advertising allowance.

Black Flag Co., insecticide, 12½-per cent quantity.

Blue Moon Cheese, cheese, 5-per cent advertising allowance.

Borden Sales, cheese, $30 to $50 per thousand for 500 to 700 and over a thousand; Eagle M. M. M. chocolate, $1,500.00 per month flat advertising allowance.

Boston Food Products, 5-per cent advertising allowance.

Boston Molasses, molasses, 1-5 per cent for 3,000 to 15,000 cartons.

Brill Co., H. C., E. Z. Freeze, 5 cents per dozen advertising allowance.

Brillo Manufacturing Co., Brillo, 10 advertising allowance.

[fol. 79] Brown Son, Wm., 5 advertising allowance.

Buckeye Soda, Novite, 15 advertising allowance.

Bunte, candy, 5 advertising allowance.

Jos. Burnett, extract, 5 advertising allowance.

Burnham & Morrill Co., line, $1,237.75 per month flat and 5 per cent adjustable for advertising.

Burry Biscuit, line, 5-per cent advertising allowance.

Burton Morrow, extracts, $2,000 flat for advertising allowance.

Burch Biscuit Co., biscuits, 5 per cent for advertising allowance.

California Animal Products, dog food, 4-per cent brokerage; dog food, 5-7 per cent $200,000-$300,000.

California Packing Corporation, Del Monte, 5-per cent pur. contract.

California Prune & Apricot, Sunsweet, 3-7½ per cent 5 to 10 million pounds.

California Sanitary Co., Ltd., olives, ripe, 10 per cent for advertising allowance.

Canada's Pride Products, Milco Malt, 25¢ case for advertising allowance.

Candy Crafters, candy, 5 per cent for advertising allowance.

Cargill, W. H., sirup, 5 per cent for advertising allowance.

Castleberry's Food Co., canned meats, 5-per cent brokerage.

Chappel Brothers, dog food, 5 per cent for advertising allowance plus 5-per cent brokerage.

Chef Boiardi, line, 5 per cent for advertising allowance.

Chinese Trading Co., line, 10 per cent for advertising allowance.

Chocolate Sales, Hershey line, $5,000 a month flat for advertising allowance.

Church & Dwight sodas, 10 per cent sal soda and 3 per cent bicarbonate of soda.

Clapp, Harold, Inc., baby foods, 5 per cent for advertising allowance.

Clark Bros, Chewing Gum, gum, 11 cents a box for advertising allowance.

Clayton, S. C., fruit sirup, 10 per cent for advertising allowance.

Cleveland Cleaner, wall-paper cleaner, 5 per cent for advertising allowance.

Climaline Co., Cl. & Bowlene, $11,000 per year with 5 per cent adjustable.

Climax Cleaner Manufacturing Co., cleaner, 40 cents gross for advertising allowance.

Clorox Chemical, Clorox, 5 per cent for advertising allowance.

Coast Fish, dog food, 5 per cent for advertising allowance plus 5 per cent brokerage.

Colgate Palmolive-Peet, line, Palm Olive and Octagon, 30 gross, others 15 cents a box.

College Inn, line, 5 per cent for advertising allowance.

Columbus Packing Co., 1 per cent lard, fresh and S. P. and D. S. meats; 2 per cent smoked meats; 5 per cent sausage; and special brokerage.

Comet Rice Co., rice, 10 per cent for advertising allowance; flakes, 15 per cent for advertising allowance.

Corn Products, line, $5,000 month for advertising allowance.

Cracker Jack Co., cracker jack, 3-5 per cent $25,000 and over quantity allowance.

Cranberry Canners, sauce, 2½ per cent for advertising allowance.

Crosse & Blackwell, line, 50 cents per store once a year for advertising allowance.

Crown Cork & Seal, caps, 5 per cent and 5 per cent for advertising allowance.

Cudahy Bros. Co., canned meats, 5 per cent brokerage.

[fol. 80] Curtice Bros., catsup, 5 per cent for advertising allowance.

Dairy Sealed, Inc., container milk, 2 per cent cash discount.

R. B. Davis, baking powder, 4 to 5½ per cent on $500,000 to $875,000; Coco-malt, [illegible]utrite Wax, 5 per cent advertising allowance.

Decker, Jacob E., canned meats, 5 per cent brokerage.

Derby Foods, Inc., canned meats, 5 per cent brokerage.

Detroit Soda Products, sal soda, less than carload, 10 per cent and 5 per cent for advertising allowance; carload, 10 and 10 per cent; baking soda, 5 per cent for advertising allowance.

Diament, Inc., candy, 5 per cent for advertising allowance.

Diamond Match, Signal, 7511 contract price; S. A. W., published quantity discount.

Dif Corporation, Dif cleaner, 10 per cent for advertising allowance.

Drackett Products Co., line, 5 per cent for advertising allowance.

Duff, P. & Son. Palmetto Mol., 10 cents per case for advertising allowance; Duff Reg. Mol., 20 per cent to 30 cents per case on 10,000 to 30,000 cases; mixes, 5 per cent for advertising allowance.

Duffy Mott Co., prune juice, 5 per cent for advertising allowance.

Dunlop Mills, corn meal, 10 cents per hundredweight for advertising allowance.

Durkee Family Foods, cocoanut, 1 per cent (G. F. M. memo.); salad dressing, etc., 7½ per cent for advertising and 1 per cent additional for increase; Contanina oil, 10 cents gallon for manufacturing purposes.

Durkee Mower, Marsh. fluff, 5 per cent for advertising allowance.

Eavenson & Son, Inc., soap, 30 cents per gross for advertising allowance.

Educator Bis. Chicago, line, 10 per cent for advertising allowance.

Edwards, E. H., marshmallows, 5 per cent for advertising allowance.

Fancier Foods, Inc., dog food, 5 per cent for advertising allowance plus 5 per cent brokerage.

Fred Fear, dyes, 5 per cent for advertising allowance.

Federal Washboards, washboards, 5 per cent for advertising allowance; washboards, for 14,000 dozen 5 Q.

Ferry Morse Seed, seed, 15 to 20 per cent if stocked in 1,000 to 8,500 stores.

Fitzpatrick Bros., soaps, 3 to 5 per cent, $250,000 to $400,000.

Flako Food, crusts, 5 per cent for advertising allowance.

Fleer, F. H., gum, 10 per cent for advertising allowance.

Ford, J. B., cleaner, 30 to 50 cents per case on 5 to 25,000 cases.

Foster Canning Co., dog food, 5 per cent brokerage.

Franck Hein, chicory, 2 to 3 per cent on 2,000 to 5,000 cases.

Friend Bros., line, 5 per cent for advertising allowance.

Fuji Trading Co., Chinese products, 10 per cent for advertising allowance.

Gem Products Sales Co., laundry powder, 5 per cent for advertising purposes.

General Foods Corporation, line, $30,000 flat for advertising allowance a month, or 5 per cent discount for advertising; Baker's Chocolate, $0.066 per carton Q. D. (entire trade).

[fol. 81] Giroux Co., Inc., sirups and sauce, 5 per cent for advertising allowance.

Gold Dust Corporation, honey, 1 to 5 per cent on 10,000 to 200,000 quantity; shoe polish, 66 to 84 cents per gross on $5,000 to $25,000 gross quantity, $6,500 flat advertising allowance; soaps, 2½% for advertising allowance.

Golden Rossell Co., apple brandy, 40 cents per case for advertising allowance.

Gold Medal Foods, Bisquick and Wheaties, $60,000 flat for advertising allowance.

Good Luck Food, Inc., Good Luck products, 5 per cent for advertising allowance.

Gordon & Dilworth, marmalade, 6 cents per dozen for advertising allowance.

Gorham & Co., polish, $1,600 flat in merchandise (a).

Gorton Pew, line, 5 per cent for advertising allowance.

Goudey Gum Co., gum, 5 per cent for advertising allowance.

Grocery Store Products, Kit. Bouquet, 5 per cent for advertising allowance; Toddy, 5 per cent for advertising allowance; Foulds, $180 per month for advertising allowance.

Gulden, Inc., mustard, $3,000 for 6 months for advertising allowance.

Grumpert Co., desserts, 5 per cent for advertising allowance.

Hampton Cracker Co., crackers, 5 per cent for advertising allowance.

Hansen's Laboratory, Junket, $12,000 per year for advertising allowance.

Harding, J. P., Inc., corned beef, 5 per cent brokerage; hash, 5 per cent brokerage.

Haskins Bros. & Co., soaps, 5 per cent for advertising allowance.

Hately Bros., lard, 5 cents per hundredweight brokerage.

Hecker, H. O., Co., package line, 5 percent for advertising allowance.

H. J. Heinz, line, 2 per cent for advertising allowance with extra 1 for $4,000,000.

Hills Bros., dates, etc., 5 per cent for advertising allowance; grapefruit, 2½ per cent for advertising allowance, additional 2½% if 50,000 cases; cranberry sauce, 2½ per cent for advertising allowance.

Hines, J. R., canned stew, 5 per cent brokerage.

Hipolite Co., Marsh. Creme, 5 per cent for advertising allowance.

Hires, C. E., extracts, 2 to 8 per cent on 500 to 6,000 gross quantity.

Hofherr Meat Co., corned beef, 2 per cent brokerage.

Hofherr Meat Co., canned meat, 5 per cent brokerage.

Hormel, George, canned meats, 2 to 5 per cent on $50,000 to $200,000 or over; soups, 2 to 5 per cent on 25,000 cases to 175,000 cases or over.

Hubinger Co., elastic starch, 7½ per cent for advertising allowance.

Houston, Tom, Co., peanuts, 5 per cent for advertising allowance.

Hydrox Corporation, beverages, 6 to 10 cents per case on 25,000 to 70,000 cases.

Hygienic Products, Sani Flush, 15,000 flat, with adjustment to 7½ per cent for advertising allowance.

Hygrade Food, lard, 1 per cent for $10,000 or over; smoked meats, 2 per cent for $5,000; sausage, 5 per cent for $5,000.

Illinois Meat Co., canned meats, 5 per cent brokerage.

[fol. 82] Illinois Nut Co., candies, 5 per cent for advertising allowance.

Ivanhoe Foods, Inc., mayonnaise, 5 per cent for advertising allowance.

Jelke, John F., margarine, one-half cent per pound for advertising allowance.

Jel Sert Co., flavorade, 5 per cent for advertising allowance.

Jersey Cereal, corn flakes, 5 per cent for advertising allowance.

Johnson, Robert A., fudge, 5 per cent for advertising allowance.

Johnson, S. C., wax, $1,500.00 flat for advertising allowance (6 months only).

Johnson Educator, line, 5 to 7 per cent for $300,000 to $800,000 or over.

Kerr's Butter Scotch, candy, $100 flat per month for advertising allowance.

Kingan & Co., canned meats, 5 per cent for brokerage.

Kirkman & Son, soap line, 10 cents per case for advertising allowance.

Kosto, freeze, 5 per cent for advertising allowance.

Kraft Phenix Cheese, line, 2 to 3½ per cent for $100,000 to $800,000 and an additional 1½ per cent for quantity.

Kraft Phenix Cheese, milk chocolate, 5 per cent for advertising allowance.

Kwik Set, Inc., Kwik Set, 7½ per cent for advertising allowance.

LaChoy Food Products, Chinese food, 5 per cent for advertising allowance.

Lamont-Corliss, candy, $2,000 per month for 6 months for advertising allowance.

Larson Co., pureed vegetables and fruits, 10 per cent for advertising allowance.

Layton Pure Food, baking powder, 6 per cent for advertising allowance with additional 2 per cent for quantity.

Lever Bros., soap, $275,000 flat for advertising allowance.

Libby, McNeill & Libby, canned meats, 5 per cent brokerage.

Liberty Cherry & Fruit, canned meats, 5 per cent brokerage.

Life Savers, Inc., candy, $7,625 flat, for advertising allowance.

Liggett & Myers, Chesterfields, $1 per store per month for 7 months.

Lindsay Ripe Olive Co., ripe olives, 5 per cent for advertising allowance.

Lipton, T. J., tea 7½ per cent for advertising allowance.

Liquid Veneer Corporation, mops and polish, 10 per cent for advertising allowance.

Loudon Packing Co., doggie shampoo, 10 per cent (JJM memo); doggie dinner, 5 per cent brokerage; doggie dinner, $18,000 flat for advertising allowance.

Louisiana State Rice, rice, 5 per cent for advertising allowance.

J. C. Lukens Brokerage Co., dog food, 5 per cent brokerage.

McAteer, thirst ade, 5 per cent for advertising allowance; dyes, 5 per cent for advertising allowance.

McCormick & Co., insecticide, 5 per cent for advertising allowance.

McIlhenny, tabasco sauce, 5 to 10 per cent on 250 to 1,000 cases and over.

McKenzie Milling, package flour, 3 per cent, additional 5 per cent for 40 per cent increase.

[fol. 83] Maillard Corporation, cocoa and chocolate, $30 per thousand for advertising allowance.

Manes Food Products, cole slaw and betts, 5 per cent (JJM memo).

Manhattan Soap, soap, 10 cents per box for advertising allowance.

Marvin, W. H., dates, 6 per cent for advertising allowance.

Dr. George C. Melody, dog food, 5 per cent for advertising allowance; dog food, 5 per cent brokerage.

Metal Textile Co., cleaner, $2,000 flat for advertising allowance.

Mickelberry's Food, canned meats, 5 per cent brokerage.

Miller & Hart, packing-house products, 2½ to 17½ per cent per hundred-weight.

Minnesota Consolidated Co., canned corn, 5 per cent advertising allowance.

Minnesota Valley Canning, Del Maiz line, 5 per cent for advertising allowance.

Mione Manufacturing, polishes, 25 cents per gross for advertising allowance.

Mitsubishi Shoki, crabmeat, 1 per cent for advertising allowance.

M. J. B., tea and coffee, $2,000 flat for advertising allowance.

Jorrell, John, canned meats, 5 per cent brokerage; dog food, 5 per cent brokerage; 5 per cent for advertising allowance.

Morris, Phillip, P. M. and Marlboros, 3 per cent for advertising allowance.

Morton Salt, salt, 15 cents per case (GFM Memo.)

National Biscuit Co., line, 5 per cent by N. B. C. branch direct, and 1 per cent to 4½ per cent by N. B. C. headquarters, according to quantity bracket reached.

National Foods, Inc., kiddie malt, 7½ per cent for advertising allowance.

Naylee Chemical Co., bleach, 10 per cent for advertising allowance.

Newark Packing, sliced beef, 5 per cent brokerage.

Northern Paper, toilet paper, $5,500 flat for 3 months' promotion.

Noxon, Inc., Noxon Polish, 10 per cent for advertising allowance.

Oakite Products, Oakite, 5 per cent Oakites Prom. Cont.

Oelerich & Berry, syrup, 5 to 10 per cent on $15,000 to $40,000 and over quantity discounts.

O. K. Potato, chips, 5 per cent for advertising allowance.

Old Trusty Dog Food, canned dog food, 5 per cent brokerage, 5 per cent for advertising allowance.

Oswego Candy, candy, 5 per cent for advertising allowance.

Paas Dye Co., dyes, 5-per cent advertising allowance.

Pabstett Corporation, cheese, 2½-per cent advertising allowance.

Pacific Coast Borax Co., borax, 5-per cent advertising allowance.

Paist, F. M. candy, 5¾ cents a box advertising allowance.

Parson's Ammonia Co., ammonia, 10-per cent advertising allowance.

Penick & Ford, molasses, 1 to 6½ per cent, 5,000 to 115,000 cases and over, quantity discount; syrup, 1 to 6 per cent, 5,000 to 55,000 cases and over, quantity discount; My-T-Fine Dessert, 1 to 7 per cent, 500 to 75,001 cases and over, 15 cents case, advertising allowance; Southern Syrup, 3-per cent advertising allowance.

Pen Jel Corporation, Pen Jel, 10-per cent advertising allowance.

[fol. 84] Penn Dist. Co., dog food, 5-per cent brokerage.

Penn Tobacco Co., cigarettes, 5-per cent advertising allowance.

Perkins Products, Kool Ade, 5-per cent advertising allowance.

Peter Paul, Inc., candy, $6,000 a year flat for advertising.

Pillsbury Flour, package flour, $15,000 for 100,000 cases, quantity discount.

Planters Nut & Chocolate, candy, $600 a year advertising allowance.

Pomona Food Co., pimientos, 5 per cent if we buy 5,000-dozen quantities.

Pompeian Olive Oil, olive oil, 5-per cent advertising allowance.

Premier Pabst Co., malt extract, 10-per cent advertising allowance.

Prescott, H. L., polishes, $12,000 per year flat for advertising.

Price Flavoring Extracts, extracts, 5-per cent advertising allowance.

P. & G. Dist. Co., soaps, 15 cents case; crisco, one-quarter cent per pound, plus $61,000 flat for advertising (D. T. B. memo).

Puhl, John, bluing, $300 per month flat for advertising.

Pure Food Hansa, bouillon, 10-per cent advertising allowance; chicken products, $125 per month flat for advertising and, in additional, quantity scale 5 to 15 cents on 5,000 to 40,000 cases.

Randall Chicken Products, canned meats, 5-per cent brokerage.

Rath Packing Co., canned meats, 5 per cent brokerage.

Reid Union Dairy, milk, 2 per cent cash discount.

Rich Prod. Corporation, dog food, 5 per cent advertising allowance and 5 per cent brokerage.

Richardson & Robbins, R. & R. line 2½ advertising allowance.

Rival Packing Co., dog foods, 5 per cent brokerage and 5 per cent advertising allowance.

Roberts & Oake, packing-house products, 2½ to 40 cents per hundredweight on 200,000 to 12,000,000 pounds; pickled products, 5 per cent brokerage.

Dr. W. S. Ross, dog and cat foods, 5 per cent to 6 per cent on $1 to $75,000 and over and 5 per cent brokerage.

Rumford Co., line, 6 per cent advertising allowance, with 2 per cent additional for increases.

Runkel Bros., candy, 7 cents per box advertising allowance.

Runkel Bros., Runkomalt, 5 per cent advertising allowance.

Salada Tea Co., tea, $25,000 per year flat for advertising.

Sakerno-Megowen Biscuit Co., biscuits and crackers, 5 per cent quantity discount.

Scott Paper Co., toilet tissue, $1 per store per month advertising allowance.

Scull, W. S. line, 5 per cent advertising allowance.

Seminole Corporation, tissue, 7½ per cent advertising allowance and plus 5 per cent quantity.

Shefford Cheese Co., cheese, 3 per cent (J. J. M. memo).

Shotwell Manufacturing Co., mints, 5 per cent advertising allowance.

Simmons, T. N., Inc., dessert, 5 per cent advertising allowance.

Skiddo Co., Inc., cleanser, 5 per cent advertising allowance.

Skinner Manufacturing Co., raisin bran, 5 per cent advertising allowance.

Smithfield Ham & Pr. Co., canned meats, 5 per cent advertising allowance.

Snider Packing Co., condiments, 5 per cent advertising allowance.

Solarine Co., polish and cleanser, 5 per cent advertising allowance.

[fol. 85] S. O. S. Manufacturing Co., cleanser, $4,125 per quarter advertising allowance.

Southern Molasses Co., molasses, 5 per cent advertising allowance.

Spratt's Patent, Ltd., line, 5 to 6¼ per cent on $30,000 to $50,000 and over.

Stahl-Meyer, Inc., sausages, etc., 5 per cent brokerage.

Staley Sales, corn starch, 10 per cent advertising allowance.

Standard Brands, foil feast, $144,000 a year advertising allowance, 10 per cent quantity discount; Chase & Sanborn's coffee, $97,164 per year advertising allowance; Tenderleaf Tea, $394 per 1,000 advertising allowance; Royal Gelatin, $38,004 per year advertising allowance; Royal Baking Powder, $15,000 per year advertising allowance;

Dr. Price Baking Powder, $996. per year advertising allowance.

Steele-Wallace Corporation, clothes pins, 5 per cent advertising allowance.

Stokely Bros., baby foods, 5 per cent advertising allowance.

Straub, W. F., honey, 2 per cent advertising allowance.

Swift & Co., canned meats, 3 to 5 per cent on 200,000 pounds to over; 300,000 pounds quantity discount.

Tasty Yeast, Inc., Tastyyeast, 5 per cent advertising allowance.

Jos. Tetley, tea, 7½ per cent advertising allowance.

Texas Fig Company, preserved figs, 2½ to 5 cents per dozen (Wil. memo.).

Thinshell Products, cookies, 5 per cent advertising allowance; biscuits and crackers, 5 per cent advertising allowance; candy, 5 per cent advertising allowance.

Thomson & Taylor, extracts, 5 per cent advertising allowance; pie spice, 5 per cent advertising allowance.

Three Minute Cereal, line, 2½ to 10 cents per case advertising allowance.

R. E. Gongue, fly ribbon, 5 per cent advertising allowance.

Tumbler Laboratories, polish, 25 cents per dozen advertising allowance.

Tupman Thurlow, canned meats, 5 per cent advertising allowance; crab meat, 6½ per cent advertising allowance.

Ultramarine Co., Bleachette, 5 per cent advertising allowance and in Q. of 1 to 3 per cent for 10 to 30 per cent increase.

Underwood, William, deviled ham, 5 per cent brokerage; line, $3,000 per year advertising allowance.

United Packers, canned meats, 5 per cent brokerage.

Up-to-Date Candy, cough drops, 5 per cent advertising allowance.

Val Decker, packing-house products, 1 to 5 per cent brokerage.

Van Camp's, con carne, 5 per cent advertising allowance.

Vaughan Packing Co., dog food, 10 per cent advertising allowance.

Vestal Chemical Co., floor wax, 10 per cent advertising allowance.

Victory Packing Co., dog foods, 4 per cent brokerage.

Vogt, F. G., dog foods, 5 per cent brokerage; 5 per cent advertising allowance.

Waggoner, Norman, olives, 10 per cent advertising allowance.

Walker Austex, hot tamales, 2½ per cent advertising allowance.

Welch Grape Juice Co., grape juice, $2,000 advertising allowance for 6 months.

Werner, Paul A., cigarettes, 5 per cent advertising allowance.

Wesson Oil & Snow Co., oil, $5,000 per quarter advertising allowance.

Weston, George, Ltd., biscuits, 5 per cent advertising allowance.

White King Soap Co., soap, 5 per cent advertising allowance.

Whitman, F., & Son, chocolate, 6 per cent advertising allowance.

Wilbert Products, ammonia, etc., 5 per cent advertising allowance.

Wilbur Suchard, candy, $200 per 1,000 advertising allowance.

Wilson & Co., canned meats, 5 per cent brokerage.

Wright, J. A., silver cream, 10 per cent advertising allowance.

Wrigley, William, gum, $7,000 per month advertising allowance.

[fol. 86] Wrisley, Allen B., Olivilo, 10 to 15 cents a case on 7,500 to 15,000 and over.

Zion Institutions and Independent Baked Goods, 5 per cent advertising allowance.

	Quantity discount per cwt.
National Sugar Refining Co.	$0.12½
California & Hawaiian Sugar Co.	.10
Eastern Beet Sugar	.10
McCahan Sugar Refining Co.	.10
Pennsylvania Sugar Co.	.10
Savannah Sugar Refining Co.	.10
American Sugar Refining Co. (if purchases reach 1,000,00- bags per year)	.10
Godchaux Sugar Co.	.05
Vizcaya Sugar Co. (Cuban refined)	.05

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Defendants further show that the Great Atlantic and Pacific Tea Company, complainant herein, receive from manufacturers, each year, as advertising allowances upward of Six Million ($6,000,000.00) Dollars, which amount is paid to the complainant by the manufacturers as a bonus, and which, in effect, reduces the purchase price of the commodities sold by the manufacturer to the Great Atlantic and Pacific Tea Company; that in addition to advertising allowances, there are other allowances as set forth in this answer.

Defendants further show that the annual advertising allowance from General Foods, Incorporated, to the complainant, is upward of Three Hundred Sixty Thousand ($360,000.00) Dollars, and from Standard Brands, Incorporated, the complainant receives annually a bonus upward of Three Hundred Thousand ($300,000.00) Dollars a year as advertising allowances alone; that these allowances and discounts are given the complainant for the reason that it possesses tremendous purchasing power, which purchasing power is created by the great number of retail units operated by complainant.

[fol. 87] Defendants further show that the advertising allowances aforementioned are used by the complainant in any manner it sees fit, and that no record is kept of whether the fund is spent for advertising or for other purposes.

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Defendants further show that the advertising allowances aforementioned do not appear on the invoices of goods sold by the manufacturers to the complainant, and are in addition to any discounts or special prices appearing on said invoices.

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Defendants further show that the allowances described in the preceding paragraphs are given only to large chains, and the larger the number of units in the chain the greater the opportunity of obtaining said allowances and discounts, and that said allowances and discounts are not given to independent retailers.

Wherefore, defendants pray that the preliminary injunction issued herein be recalled and set aside and that the demands of complainant be rejected at its cost.

Defendants further pray for all necessary orders, and for general and equitable relief.

(Signed) Gaston L. Porterie, Attorney General of the State of Louisiana. (Signed) Justin C. Daspit, Special Assistant Attorney General. (Signed) F. A. Blanche, Special Assistant Attorney General. (Signed) E. L. Richardson, Special Assistant Attorney General.

[fol. 89] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION—Filed May 28, 1936

It is hereby stipulated and agreed by and between counsel for Plaintiff and Intervenors and counsel for Defendants as follows:

(1) The answer filed to the principal bill shall stand as an answer to the interventions provided that insofar as the interventions make allegations not made in the principal bill, such allegations are to be considered as denied.

(2) The cause is to be set down for hearing upon the merits upon the application for a permanent injunction in behalf of the complainant and the intervenors as soon as may be.

(3) For the purposes of making up the record upon which the case shall be heard upon the merits, it is admitted by the parties respectively that the witnesses hereinafter named would testify to the matters and statements set out in their respective affidavits, the originals of which are attached hereto and are to be filed with this stipulation, and such affidavits are to be received in evidence precisely as if the witnesses named had been examined before a Master and given their depositions in the same language as appears in their respective affidavits, with the right in any party upon argument of the case to object to any statement in any affidavit on any ground other than form upon which objection might have been made if the depositions had been taken and objections made and reserved at the time of taking. The witnesses referred to in this paragraph and the affidavits made by them are described as follows:

Witnesses for Plaintiff and Intervenors

Original Affidavits

J. B. Breckinridge, dated July 23, 1935.
J. C. Peregoy, dated July 12, 1935.
James F. Stewart, dated May 21, 1935.
R. W. Story, dated July 17, 1935.
[fol. 90] H. D. Kittinger, dated May 27, 1935.
Phoenix S. Franks, dated May 31, 1935.
Irving F. Strom, dated July 16, 1935.
L. O. Schmidt, dated July 16, 1935.
J. A. Donaldson, dated July 18, 1935.
C. B. Fullerton, dated May 21, 1935.
Walter C. Schulz, dated November 15, 1935.
A. J. Raskopf, dated August 23, 1935.
E. P. Tolley, dated July 13, 1935.
C. L. Schenk, dated May 11, 1935.
William H. Schield, dated May 11, 1935.
J. T. Leftwich, dated May 27, 1935.

Witnesses for Defendants

Original Affidavits

W. T. Sugg, dated October 15, 1935.
A. D. Turner, dated October 16, 1935.
C. B. Ellis, dated October 17, 1935.
E. M. Steen, dated October 17, 1935.
Joe Issacman, dated October 18, 1935.
A. A. Allen, dated November 22, 1935.
Clark Faulk, dated October 26, 1935.
B. Morgan, dated November 23, 1935.
J. W. Baker, J. S. Trisconi, J. W. Elston, W. C. Marshall and J. H. Brown, dated November 27, 1935.
W. E. Penick, dated November 23, 1935.
James D. Huck, Jr., dated January 4, 1936.
James T. Burns, dated February 6, 1936.
Lorris M. Wimberly, dated February 6, 1936.

Rebuttal Affidavits for Plaintiff and Intervenors

J. C. Peregoy, dated February 10, 1936.
David T. Bofinger, dated January 2, 1936.
R. W. Story, dated February 10th and February 20th, 1936.

H. D. Kittinger, dated February 24, 1936.
Phoenix S. Franks, dated February 5, 1936.
E. P. Tolley, dated February 20, 1936.
C. L. Schenk, dated February 21, 1936.
J. T. Leftwich, dated February 10th and March 16th, 1936.
Paul H. Nystrom, dated March 16, 1936.
Roland Ladreyt, dated December 27, 1935.

Additional Affidavits for Defendants

W. E. Penick, dated March 16, 1936.

It is agreed that objections to any statement in any affidavit on any ground other than form may be presented in oral argument or in brief with precisely the same effect as if such objections were made when the affidavits were offered in evidence and that the right to insist upon such objections shall be reserved to each party by presentation in oral argument or in brief so that each party shall be in the same [fol. 91] position as if such objections had been maintained by the trial court or overruled by the trial court and a bill of exceptions reserved.

(4) It is admitted that the figures as to sales reported on license affidavits are correctly shown in the exhibits attached to the affidavits of J. C. Peregoy and Irving S. Strom and would be substantiated by the original license records and that such records need not be offered in evidence.

(5) It is agreed that the testimony of Charles W. Parr and F. W. Gundrey given before the Special Committee on Investigation American Retail Federation House of Representatives, 74th Congress, First Session, held in June and July, 1935, appearing at pages 429-501 in the official report of said hearings, is admitted in the case at bar as if said parties were present and testifying in this court at the trial of this case on its merits, and it is further agreed that the report of said hearings shall be admitted in evidence for the purpose of giving the testimony of said Charles W. Parr and F. W. Gundrey; it is further admitted that the list of manufacturers appearing at pages 464-470 of said report forms a part of the testimony of said Charles W. Parr.

It is admitted by the Great Atlantic & Pacific Tea Company, the complainant in the suit at Bar, that it operates in the United States 14,705 retail units, selling the same general

type of merchandise; that these 14,705 units are located in 38 States of the Union and the District of Columbia; that complainant has stores in every State with the exception of the following: Utah, Idaho, Colorado, Wyoming, New Mexico, Montana, Nevada, South Dakota, North Dakota and Oregon. It is further admitted that the number of units operated by the Great Atlantic & Pacific Tea Company in various States may be classified and grouped as follows:

More	than	2500	units	operated	in	1	State.
2000	to	2500	"	"	"	1	"
1000	to	2000	"	"	"	4	"
500	to	1000	"	"	"	1	"
250	to	500	"	"	"	7	"
100	to	250	"	"	"	13	"
50	to	100	"	"	"	5	"
25	to	50	"	"	"	3	"
10	to	25	"	"	"	0	"
Less	than	10	"	"	"	4	"

It is further admitted that the exact number of stores operated by the Great Atlantic & Pacific Tea Company in States adjoining Louisiana is as follows:

In Texas 333 stores.
In Mississippi 33 stores.
In Arkansas 3 stores.

(6) It is further agreed that this stipulation shall not be construed as barring the introduction by either party of documentary evidence at the time of trial on its merits, but this stipulation shall be confined to the matters referred to herein.

[fol. 92] Dated April 27th, 1936.

(Signed) Monroe & Demann, Attorneys for Plaintiff & Intervenors. (Signed) Justin C. Daspitt, E. L. Richardson, Attorneys for Defendants.

[fol. 93] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL STIPULATION—Filed May 28, 1936

In the above entitled and numbered matter, it is hereby expressly stipulated and agreed by and between counsel for

plaintiff and intervenors and counsel for defendants that the Court shall be at liberty to take judicial notice of reports of the Federal Trade Commission, the Bureau of the Census and any other official Government publications or reports; and that no such reports or publications need be offered in evidence or copied into the record but that the same may be referred to in argument or briefs and shall be considered by the Court to the same extent as if they had been specially offered in evidence and copied into the record, reserving to each party the right to urge in argument or briefs any objection to the matter in such reports or publications on any ground other than form.

Dated May 28, 1936.

(Signed) Monroe & Lemann, Attys. for Plaintiff and Intervenors. (Signed) E. L. Richardson, Atty. for Supervisor of Public Accounts.

[fol. 94] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF J. B. BRECKENRIDGE—Filed May 28, 1936

UNITED STATES OF AMERICA,
State of New York,
County of New York, ss:

J. B. Breckenridge being duly sworn, deposes and says:

I am Assistant Secretary of The Great Atlantic & Pacific Tea Company, an Arizona Corporation.

The Great Atlantic & Pacific Tea Company (of Arizona) and its affiliated companies operated as of March 2, 1935 (the close of its last fiscal year) a total of 15,035 stores, of which 14,756 were operated in the United States and 279 were operated in Canada. The stores in this country were located in 38 States and in the District of Columbia. The Great Atlantic & Pacific Tea Company had at the opening of its last fiscal year 101 stores in the State of Louisiana. At the close of its fiscal year, it had 106 stores in Louisiana, and the largest number in Louisiana at any one time during said period was 107 stores; 63 stores were located within the City of New Orleans and the remaining number outside that city.

All the stores of The Great Atlantic & Pacific Tea Company sell groceries and dairy products, and of these 5231 are combination stores in which meat and poultry are also

sold. Of the stores in Louisiana, 30 of them are combination stores in which meat and poultry are sold as well as groceries and dairy products. The stores also sell various other articles of a cognate character which are bought for household use.

The merchandise sold by the stores, and the stores themselves, vary widely in different sections of the country, [fol. 95] depending upon local tastes and customs, standards of living and many other factors. Each store must be designed in size, character and nature of its merchandise to meet the conditions in the trading area in which it is located. Similarly, there is a wide variation in store operating results, due to the effect of many different local factors, including consumers' purchasing power, expense of operation, price levels in the community, local laws and taxes, population of the trading area, competency of personnel, etc. Foodstuffs that sell in some parts of the country are not desired in other sections, and from locality to locality there is a variation in the items which must be stocked and which can be sold. This is true of Louisiana just as it is of the other localities in which the stores are located. The stores vary widely in amount of sales and profits, and there is no constant ratio between sales and profits in the various stores. Likewise, from year to year the sales and profits of the different stores vary substantially, and from year to year the sales and profits from different sections of the country vary substantially.

The number of items sold varies from approximately 800 items in some stores to approximately 1250 items in other stores of the group where meat is not sold. In the combination stores the number of items varies from approximately 1150 in some stores to approximately 1800 in other stores. Different sizes of the same article are included as different items, the criterion for a different item being the necessity of establishing a different price.

The number of employees per store varies from one regular employee in some stores up to twenty in other stores, and a few stores have substantially more employees than that.

[fol. 96] The annual sales per store vary from about $13,500 per store to over $125,000, and a few stores (all outside of Louisiana) run very much higher, one of them having sales of over $800,000 per year.

In Louisiana the total sales per store were approximately as follows (the years being the Company's fiscal years):

1931	$49,000
1932	38,000
1933	38,000
1934	42,000

The average sales per store in 1934 for stores everywhere were almost $55,000.

In Louisiana the net profits per store after expenses and taxes, including the United States income tax, were approximately as follows:

1931	$390
1932	280
1933	550
1934	770

In the year 1934 the net profit per store of all the stores was approximately $1,000.

(Signed) J. B. Breckenridge.

Subscribed and sworn to before me, this 23rd day of July, 1935. John Young, Notary Public, Queens County.

[fol. 97] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF J. C. PEREGOY—Filed May 28, 1936

UNITED STATES OF AMERICA,
State of Louisiana,
Parish of Orleans:

Before me, the undersigned authority, a Notary Public, duly commissioned and qualified, in and for the aforesaid Parish and State, this day personally came and appeared: J. C. Peregoy, a resident of the City of New Orleans, to me personally known, who being first duly sworn, did depose and say:

My name is J. C. Peregoy. I am 40 years of age. I am General Superintendent of the Great Atlantic & Pacific

Tea Company, stationed in New Orleans, and I have jurisdiction of all operations of that Company in Louisiana except the operations in Shreveport, Minden and Lake Charles. I am generally familiar with the operations in those Towns. During the year 1934, the Great Atlantic & Pacific Tea Company operated stores at 107 locations in Louisiana. 63 of the stores now in operation are located in the City of New Orleans; 44 are located at the points in Louisiana outside New Orleans shown in Exhibit "A" hereto annexed.

The operations of the Atlantic & Pacific Tea Company in the City of New Orleans are in every important respect the same as those of H. G. Hill Stores, Inc., which operates 87 stores in New Orleans. We operate a chain of grocery and meat stores in New Orleans and they do also. Our stores carry about the same lines of merchandise and our merchandising methods are practically the same. They feature leader items in the same way that we do. Their prices and ours are usually practically the same. They may undersell us on a given day on certain particular leader items and we may undersell them on other items that day and the next day we may be cheaper than they were on the preceding day and vice versa. It is nip and tuck between us with no advantage to us in selling prices. They sell for cash without delivery and so do we. They do very extensive advertising and so do we. In the City of New Orleans, their advertising is more extensive than ours; I should say that they do 25% or 30% more advertising than we do in New Orleans, they frequently taking full pages of city newspapers. Their gross volume of sales in New Orleans is very much greater than ours. They not only have more stores than we do at more locations but the majority of their stores do more business per store than we do. In many cases, we have a store in the same square as they have and, in the majority of cases, their store in a given square sells more goods than our store in that square. I have caused [fol. 98] an examination to be made of the license affidavits filed by H. G. Hill Stores, Inc., for the years 1933 and 1934 which recite for each of their stores the sales of that store in the preceding year as a basis for the calculation of the general license tax of the City of New Orleans which is based upon gross sales. I have prepared statements which

compare the sales of H. G. Hill Stores, Inc., as reported in their license affidavits, with the sales of Atlantic & Pacific Tea Company, as shown by our records, and I attach hereto the following exhibits:

Exhibit "B": This covers the year 1934 and shows the number of Hill stores and Atlantic & Pacific stores having gross sales within the limits shown. This statement shows that Hill -as a great many stores doing a larger sales volume than A. & P. stores. It also shows that whether on a maximum or minimum basis, Hill does a great deal larger aggregate volume of business than A. & P.

Exhibit "B-1": This lists the Hill and A. & P. stores which are located either in the same block or within a block of each other and shows for each location the volume of sales reported. An examination of this list will show that in 27 cases out of 30 where A. & P. and Hill have stores within a block of each other, the Hill store does a materially larger volume of business than the neighboring A. & P. store.

Exhibits "C" and "C-1": These give the same information for the year 1933 as Exhibits "B" and "B-1" give for the year 1934 and make substantially the same showing. In 1933, there was only 1 case in which an A. & P. store situated within a square of a Hill store did more business than the Hill store. The 1933 figures cover 91 Hill stores and 62 A. & P. stores.

Hill's local expenses of operation are less than those of A. & P. On an average, A. & P.'s standards of pay to clerks are higher than Hill's standards of pay. We pay our men practically the same amount of money for working 48 hours as Hill pays their men for working 63 hours. Our stores have about the same staff as theirs do and they have about the same organization set-up as we have. They have an advantage in local ownership and contacts. My information is that their Company is controlled by Mr. Penick and his father-in-law, Mr. Hill. Mr. Penick is a resident of New Orleans with many local connections and in a position to give immediate ownership supervision. Their record of sales reflects to some extent this advantage. They buy and sell merchandise on such a large scale that — can purchase all the nationally known brands which

[fol. 99] are the chief items in their and our business on as advantageous a basis as we can. Under the new Louisiana 1934 law, however, they would pay a chain store tax on 87 stores ranging from a minimum of $10.00 per store to a maximum of $30.00 per store while we would be required to pay a tax of $350.00 per store on every store. The extent of the differential imposed by this tax is illustrated by the fact that the average rental we pay in New Orleans for a store is $77.00 per month, which amounts to $924.00 per year, as compared with a discrimination in tax between A. & P. and Hill of over $530.00 per year.

Outside of New Orleans, A. & P. is in competition with local chains at practically every point at which it does business. Thus in Baton Rouge where A. & P. has 6 stores, Community Stores, Inc., a local chain, has, according to the latest information available to us, 15 stores, and Capital Stores operates 10 stores in Baton Rouge in competition with us. Our information is that Capital Stores controls Community Stores, making a total of 25 stores operated by these interests in competition with us in Baton Rouge. These same interests operate 13 stores in New Orleans. In Shreveport, where A. & P. has 8 stores, Piggly-Wiggly Stores operate 8 stores in competition with us and Big Chain Stores, Inc., operate 5. In Monroe, where A. & P. has 2 stores, Louisiana Stores Co., Inc., or Jitney Jungle, operate 8 stores. This number has recently been increased as formerly it was 7.

(Sgd.) J. C. Peregoy.

Sworn to and subscribed before me at New Orleans, La., this 12 day of July 1935. (Sgd.) Watts K. Leverich, Notary Public. (Seal.)

[fol. 100] EXHIBIT A

List of Louisiana Stores Located Without the City of New Orleans

Street Address	City	Parish
Metairie & Focis	Metairie, La	Jefferson
Metairie Heights	Metairie, La	Jefferson
Jefferson Highway & Central Avenue		Jefferson
4th and Murray	Alexandria, La	Rapides
722 Bolton	Alexandria, La	Rapides
33 Columbia Road	Bogalusa, La	Washington
Boston St	Covington, La	St. Tammany
Parkenson & E. 3rd	Crowley, La	Acadia
117 Thomas St	Hammond, La	Tangipahoa
	Jennings, La	Jefferson Davis
Jefferson St	Lafayette, La	Lafayette
113 Catalpa St	Monroe, La	Ouachita
2501 Grand St	Monroe, La	Ouachita
	Marksville, La	Avoyelles
E. Main St	New Iberia, La	Iberia
612 Main St	Pineville, La	Rapides
416 Pine St	Ponchatoula, La	Tangipahoa
Goode St	Houma, La	Terrebonne
712 Main St	Franklin, La	St. Mary
624 Main St	Winnfield, La	Winn
624 Front St	Natchitoches, La	Natchitoches
202 Trenton St	Ruston, La	Lincoln
Main St	Jonesboro, La	Jackson
1206 N. Blvd	Baton Rouge, La	East Baton Rouge
Government & Dufrocq	Baton Rouge, La	East Baton Rouge
635 Government	Baton Rouge, La	East Baton Rouge
570 Main St	Baton Rouge, La	East Baton Rouge

[fol. 101]

1804 N. Blvd	Baton Rouge, La	East Baton Rouge
Dixie, La	Baton Rouge, La	East Baton Rouge
111 Hodges	Lake Charles, La	Calcasieu
1227 Ryan	Lake Charles, La	Calcasieu
Ryan and Mills	Lake Charles, La	Calcasieu
	Minden, La	Webster
	Bossier City, La	Bossier
1164 Texas	Shreveport, La	Caddo
3104 Missouri	Shreveport, La	Caddo
546 Olive St	Shreveport, La	Caddo
2650 Southern	Shreveport, La	Caddo
3224 Line	Shreveport, La	Caddo
137–70th St	Shreveport, La	Caddo
133 King's Highway	Shreveport, La	Caddo
2119 Marshall	Shreveport, La	Caddo
	Homer, La	Claiborne
	Many, La	Sabine

[fol. 102]

Exhibit B

Comparison of Operations

Calendar Year 1934

New Orleans Stores

	H. G. Hill Stores, Inc.	The Great A. & P. Tea Co.
I. With Sales Less Than $15,000	1	4
" " " " 20,000	4	8
" " " " 25,000	8	10
" " " " 30,000	9	13
" " " " 40,000	19	11
" " " " 50,000	6	12
" " " " 75,000	24	3
" " " " 100,000	8	..
" " " " 150,000	5	...
" " " " 200,000	1	..
" " " " 350,000	1	..
II. Total No. of Stores Reported	86	61
With Gross Total Sales of Not More Than.....(Maximum)	$5,515,000	$2,125,000
With Gross Total Sales of Not Less Than.....(Minimum)	4,010,000	1,645,000

[fol. 103]

Exhibit B-1

H. G. Hill Stores in Direct Competition with the Great Atlantic & Pacific Tea Company Stores

Sales 1934

The Great A. & P. Co. Stores		H. G. Hill Stores	
Not More Than		Not More Than	
$20,000	2514 Bayou Road	$50,000	2519 Bayou Road
40,000	900 N. Carrollton	50,000	4028 Dumaine
25,000	3028 Gentilly	70,000	3835 Frenchmen
35,000	2629 Bruxelles	35,000	2615 Bruxelles
20,000	2500 Iberville	75,000	2501 Canal
25,000	2301 Soniat	50,000	5104 Freret
45,000	4315 S. Claiborne	95,000	4321 S. Claiborne
50,000	2731 S. Broad	125,000	2727 S. Broad
50,000	4725 Freret	35,000	4519 Freret
25,000	6100 Magazine	75,000	6000 Magazine
25,000	5301 Magazine	30,000	5429 Magazine
40,000	4237 Magazine	60,000	4235 Magazine
30,000	3200 Banks	40,000	3101 Banks
20,000	6231 S. Claiborne	95,000	6201 S. Claiborne
15,000	1800 Washington	60,000	1736 Washington

Exhibit B-1—Continued

The Great A. & P. Co. Stores Not More Than		H. G. Hill Stores Not More Than	
30,000	3302 Magazine	40,000 25,000	3132–37 Magazine
20,000	2010 Magazine	75,000	1936 Magazine
50,000	1433 Baronne	40,000	1431 Carondelet
20,000	3911 Baronne	65,000	3917 Baronne
40,000	605 Opelousas	30,000 90,000	606–616 Opelousas
40,000	1100 Camp	60,000	1062 Camp
30,000	2901 Broadway	55,000	2803 Broadway
40,000	5331 Canal Boulevard	95,000	5209 Canal Boulevard
40,000	2201 Fern	65,000	7736 Sycamore
15,000	7732 Maple	55,000	800 Fern
55,000	8201 Oak	50,000	8130 Oak
50,000	4538 Palmyra	55,000	301 S. Olympia
15,000	139 N. Hennessey	30,000	4301 Canal
50,000	2603 Jasmine	55,000	2609 Jasmine
30,000	3000 S. Carrollton	350,000	3215 S. Carrollton

[fol. 104]

EXHIBIT C

Comparison of Operations

Calendar Year 1933

New Orleans Stores

	H. G. Hill Stores, Inc.	The Great A. & P. Tea Co.
I. With Sales Less Than $15,000	..	1
" " " " 20,000	9	11
" " " " 25,000	10	19
" " " " 30,000	8	14
" " " " 40,000	21	12
" " " " 50,000	11	5
" " " " 75,000	20	..
" " " " 100,000	7	..
" " " " 150,000	3	..
" " " " 200,000	1	..
" " " " 250,000	1	..
II. Total No. of Stores Reported	91	62
With Gross Total Sales of Not More Than (Maximum)	$4,716,000	$1,860,000
With Gross Total Sales of Not Less Than (Minimum)	3,464,000	1,465,000

[fol. 105] EXHIBIT C-1

H. G. Hill Stores in Direct Competition with the Great Atlantic & Pacific Tea Company Stores

Sales 1933

The Great A. & P. Tea Co. Stores		H. G. Hill Stores	
Not More Than		Not More Than	
$25,000	2514 Bayou Road	$50,000	2519 Bayou Road
40,000	900 N. Carrollton	50,000	4028 Dumaine
25,000	3028 Gentilly	70,000	3835 Frenchmen
50,000	2629 Bruxelles	55,000	2815 Bruxelles
25,000	2500 Iberville	75,000	2501 Canal
30,000	2301 Soniat	55,000	5104 Freret
50,000	4315 S. Claiborne	100,000	4321 S. Claiborne
50,000	2731 S. Broad	125,000	2727 S. Broad
50,000	4725 Freret	35,000	4519 Freret
25,000	6100 Magazine	50,000	6000 Magazine
25,000	5301 Magazine	25,000	5429 Magazine
40,000	4237 Magazine	50,000	4235 Magazine
25,000	3200 Banks	50,000	3101 Banks
25,000	6231 S. Claiborne	95,000	6201 S. Claiborne
25,000	1800 Washington	55,000	1736 Washington
25,000	3302 Magazine	50,000 30,000	3132-37 Magazine
20,000	2010 Magazine	75,000	1936 Magazine
40,000	1433 Baronne	50,000	1431 Carondelet
25,000	3911 Baronne	65,000	3917 Baronne
40,000	605 Opelousas	40,000 90,000	601-616 Opelousas
40,000	1100 Camp	40,000	1062 Camp
30,000	2901 Broadway	55,000	2803 Broadway
30,000	5331 Canal Boulevard	100,000	5209 Canal Boulevard
40,000	2201 Fern	65,000	7736 Sycamore
20,000	7732 Maple	50,000	800 Fern
50,000	8201 Oak	50,000	8130 Oak
40,000	4538 Palmyra	60,000	301 S. Olympia
15,000	139 N. Hennessey	30,000	4301 Canal

[fol. 106] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF J. C. PERRODY—Filed May 28/36

UNITED STATES OF AMERICA,
State of Louisiana,
Parish of Orleans:

Before me, the undersigned authority, a Notary Public duly commissioned and qualified in and for the aforesaid Parish and State, this day personally came and appeared:

J. C. Peregoy, to me personally known, who being first duly sworn, did depose and say:

I am and have been, since June 20, 1930, General Superintendent and Agent of the New Orleans unit of the Great Atlantic & Pacific Tea Company. In that capacity the stores operated by that Company in the City of Baton Rouge have been and are under my supervision and administration. The Great Atlantic & Pacific Tea Company operates 6 stores in Baton Rouge.

I have read a copy of an affidavit made by A. A. Allen of Baton Rouge, filed or to be filed in the suit brought by the Great Atlantic & Pacific Tea Company in the United States District Court for the Eastern District of Louisiana, attacking the constitutionality of the Louisiana Chain Store Tax of 1934. Mr. A. A. Allen has never been employed by the Great Atlantic & Pacific Tea Company. Mr. Allen was formerly employed by Community Stores, a local chain operating only in the State of Louisiana. Said Community Stores now operate 13 stores in the City of Baton Rouge, 1 store in Dixie (a suburb of Baton Rouge), 1 store in Scotland (a suburb of Baton Rouge), 1 store in Hammond and 1 in Port Allen. None of the practices referred to by the said Allen in his affidavit as having been practiced by the chain of which he was formerly Manager have been practiced by the Great Atlantic & Pacific Tea Company. It has never been the policy or practice of the Great Atlantic & Pacific Tea Company to open a unit next to or in the vicinity of an independent retailer and to slash prices in order to drive independent competition out of business.

[fol. 107] I annex hereto a summary of food stores operated in Louisiana in the Cities in which the Great Atlantic & Pacific Tea Company operates. In this summary the column headed "Voluntary Chains" refers to independently owned stores which operate under one and the same general direction and make their purchases through one and the same buying agency.

As shown in the attached summary, there are in Baton Rouge stores operated by other food chains (which includes Community Stores), 162 independently owned and operated stores and 128 stores operated as members of voluntary chains.

Since July 1, 1935, 10 new grocery stores have been opened in the City of Baton Rouge, in none of which is the Great Atlantic & Pacific Tea Company interested.

(Sgd.) J. C. Peregoy.

Sworn to and subscribed before me at New Orleans, La., this 10 day of February 1936. Harry R. Cabral, Notary Public.

[fol. 108]

EXHIBIT

Summary of Food Stores in Louisiana

By Cities in Which the Atlantic & Pacific Tea Company Operates

Town or city	No. A&P stores	No. other food chain stores	Total food chain stores	No. independent grocers	No. voluntary chain stores
New Orleans, La	66	103	169	1778	29
Jonesboro, La	1	None	1	13	None
Ruston, La	1	1	2	17	2
Natchitoches, La	1	4	5	27	None
Houma, La	1	1	2	45	None
Baton Rouge, La	6	42	48	162	32
Covington, La	1	None	1	18	None
Crowley, La	1	3	4	25	5
Winnfield, La	1	None	1	10	None
Ponchatoula, La	1	None	1	12	2
Jennings, La	1	None	1	15	2
New Iberia, La	1	None	1	40	4
Many, La	1	None	1	16	2
Homer, La	1	None	1	12	1
Lafayette, La	2	2	4	73	None
Monroe, La	2	3	5	57	2
Bogalusa, La	1	4	5	41	3
Hammond, La	1	2	3	16	4
Franklin, La	1	None	1	12	None
Alexandria-Pineville, La	5	3	8	39	2
Minden, La	1	None	1	15	2
Lake Charles, La	3	16	19	82	8
Shreveport-Bossier City, La	9	13	22	295	28
Total	109	197	306	2,820	128

[fol. 109]

(Copy)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF DAVID T. BOFINGER—Filed May 28, 1936

STATE OF NEW YORK,
County of New York:

Before me, the undersigned Notary Public, duly commissioned and qualified in and for the aforesaid County and

State, this day personally came and appeared David T. Bofinger who being first duly sworn, did depose and say:

My name is David T. Bofinger. I reside at Teaneck, N. J., and am 50 years of age. I am connected with the Great Atlantic & Pacific Tea Company in the capacity of Vice President. I have read the affidavit of W. E. Penick, Vice-President of H. G. Hill Stores, Inc., made in connection with the suit which has been brought by the Great Atlantic & Pacific Tea Company, attacking the constitutionality of Act 51 of the Louisiana Legislature of 1934. In his affidavit, Mr. Penick does not state what discounts and advertising allowances are received by the H. G. Hill Stores, Inc. H. G. Hill Stores, Inc. operates approximately 87 stores in the City of New Orleans whereas the Great Atlantic & Pacific Tea Company operates 62. The commercial reports show that H. G. Hill Stores has invested capital approximating one million dollars. The sales affidavits filed in the City of New Orleans in connection with license taxes show that the Hill Stores in 1933 reported aggregate minimum sales of not less than 4 million dollars. The operations of the H. G. Hill Stores are so extensive that they are in a position to receive, and in affiant's opinion do receive, allowances and discounts as great as those received by the Great Atlantic & Pacific Tea Co. on the great bulk of their purchases if not on all of them. The detailed facts as to those allowances are, of course, specially within the knowledge of the operators of the Hill Stores.

(Signed) David T. Bofinger.

Sworn to and subscribed before me at New York this 2nd day of January, 1936. (Signed) R. J. Schulze, Notary Public, Westchester Co. Certificate filed in N. Y. Co. 1015. Register N. Y. Co. 7S581. (Seal.)

[fol. 110] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF ROLAND DADREYT—Filed May 28, 1936

UNITED STATES OF AMERICA,
State of Louisiana,
Parish of Orleans:

Before me, the undersigned authority, a Notary Public duly commissioned and qualified in and for the Parish and

State aforesaid, this day personally came and appeared Rolland Ladreyt, a resident of the City of New Orleans, to me personally known, who being first duly sworn, deposes and says:

That he is Manager of the General Advertising Department of The Times-Picayune Publishing Company, said Company being domiciled in the City of New Orleans, State of Louisiana.

Affiant states that, according to the best of his knowledge, the 1934 edition of Grocery Route List compiled under his supervision, listing One thousand, seven hundred and seventy-eight Independent Groceries, Sixty-four Atlantic & Pacific Tea Company Grocery Stores, and One Hundred and three other Grocery Food Chain Stores, located within the corporate limits of the City of New Orleans and the immediate vicinity thereof, is a true and correct compilation.

Further states that said information is secured through canvass made by employees of said principal under his supervision.

(Signed) Rolland Ladreyt.

Sworn to and subscribed before me this 27th. day of December, 1935. (Signed) Harry R. Cabral, Notary Public. (Seal.)

[fol. 111] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JAMES F. STEWART—Filed May 28, 1936

UNITED STATES OF AMERICA,
State of Illinois,
County of Cook:

James F. Stewart, being first duly sworn, deposes and says:

My name is James F. Stewart. I am over twenty-one years of age. I reside at 2212 Sherman Avenue, Evanston, Illinois. I am Assistant Secretary of Consolidated Millinery Company and have been connected with that Company for four years.

Consolidated Millinery Company is a corporation organized under the laws of Illinois. It operates millinery departments in stores belonging to others in forty-three States and the District of Columbia. There is annexed hereto marked "Exhibit A" a statement showing the num-

ber of stores in each State in which departments are operated by Consolidated Millinery Company. In the State of Louisiana it operates five millinery departments, one each in department stores belonging to the following:

Masur Brothers, The Palace, Monroe.

D. H. Holmes Company, Ltd., 819 Canal Street, New Orleans.

Charles A. Kaufman, Ltd., 1700 Dryades Street, New Orleans.

Rosenfield Dry Goods Company, Baton Rouge.

Rubenstein Brothers, Inc., Shreveport.

None of these departments is operated in the name of Consolidated Millinery Company, but all of them are operated in the name of the owner of the department store, and all operations are subject to the supervision of that owner, who has control over the personnel employed by the lessee, and may in a large measure dictate the merchandising policies of the lessee. All advertising is done in the name of the department store and must first be approved by the store. All sales, cash or credit, are made in the name of the department store, and credit risks are borne by the store. Each department must be individually merchandised. Where we have several leased departments in stores in the same city, each store may require different classes of merchandise as to styling and as to price. Thus, for example, merchandise purchased for sale in the store of D. H. [fol. 112] Holmes Company, Ltd. may not be the same sort of merchandise as can be offered for sale in the store of Charles A. Kaufman, Ltd. because one of these stores caters to an entirely different sort of trade from that which patronizes the other, and the character of goods sold in one of these establishments is much higher priced than that which can be sold in the other. These differences constantly recur in our operations. Our operating results in Louisiana are inferior to our average operating results all over the country. Even as compared with adjoining or neighboring States of Alabama, Mississippi and Georgia, the operating results in Louisiana compare unfavorably, as shown by the following statement of the percentage of profits made in millinery departments during the years stated:

In Louisiana

1932 Loss	.543
1933 Profit	.167
1934 Profit	.89

In Virginia

1932 Profit	2.532
1933 Profit	1.074
1934 Profit	2.354

In Alabama

1933 Profit	1.268
1934 Profit	2.705

In Georgia

1933 Profit	2.185
1934 Profit	2.445

In Mississippi

1932 Profit	.709
1933 Profit	4.311
1934 Profit	6.038

The effect of the Louisiana statute, if applied to Consolidated Millinery Company is to impose a license tax of $250 upon the millinery departments operated by us in the store of D. H. Holmes Company, Ltd. and the store of Charles A. Kaufman, Ltd., while other millinery departments operated in competing stores in the City of New Orleans where departments are not specially leased, pay no license tax. A company operating five separate millinery stores under its own name in Louisiana and no store elsewhere would pay only a license tax of $10 per store under the Louisiana law as compared with our license tax of $250 per store. We enjoy in Louisiana over our Louisiana competitors no ad-
[fol. 113] vantage, and make no margin of profit in that State by virtue of the leased departments which we operate in other States, which would support the discrimination in tax for which the Louisiana law provides. In many cases our competitors have larger gross sales in Louisiana than we have and make larger operating profits than we do. Local stores have all the advantage of direct ownership, management and supervision and close personal contacts

with customers by owners. In the millinery business local tastes, conditions and contacts are specially important. Our operation of stores located in other sections of the country, many of them at remote ends of the country, has no effect upon our operations in Louisiana.

The capital invested by the Consolidated Millinery Company in Louisiana as of January 31, 1935 is approximately $4,500. Total taxes, exclusive of chain store taxes and income taxes paid by the Company to the State of Louisiana in the year 1934 aggregated $193.20.

(Signed) James F. Stewart.

Sworn to and subscribed before me at Chicago, Ill. this 21st day of May, 1935.

(Signed) Mary R. Fitzgerald, Notary Public. My commission expires May 18th, 1939.

[fol. 114] EXHIBIT "A"

Alabama	7	Montana	4
Arizona	2	Nebraska	3
Arkansas	4	Nevada	1
California	22	New Jersey	3
Colorado	3	New York	8
Connecticut	2	North Carolina	5
Delaware	1	North Dakota	1
Florida	4	Ohio	8
Georgia	3	Oklahoma	6
Idaho	1	Oregon	5
Illinois	10	Pennsylvania	16
Indiana	6	Rhode Island	1
Iowa	1	South Carolina	2
Kansas	3	South Dakota	1
Kentucky	1	Tennessee	5
Louisiana	5	Texas	19
Maryland	2	Utah	2
Massachusetts	6	Virginia	4
Michigan	8	Washington	7
Minnesota	3	Washington, D. C.	1
Mississippi	6	West Virginia	6
Missouri	5	Wisconsin	2
Dominion of Canada	2		

[fol. 115] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF R. W. STORY—Filed May 28, 1936

UNITED STATES OF AMERICA,
State of New York,
County of New York, ss:

Before me, the undersigned authority, a notary public, duly commissioned and qualified in and for the County and State aforesaid, this day personally came and appeared R. W. Story, who being duly sworn, deposes and says:

My name is R. W. Story. I am 40 years of age. I am Comptroller of W. T. Grant Company and have been connected with that Company for 13 years. W. T. Grant Company is a Massachusetts corporation engaged in operating limited price department stores. It operates five stores in Louisiana, one each at Alexandria, Baton Rouge, Monroe, New Orleans and Shreveport. Outside Louisiana, it operates 460 stores in 37 states as of January 31, 1935. Attached is a statement showing for five years past sales, expenses, earnings, percentage of earnings to sales, total assets and percentage of earnings to total assets for (a) total Companies and (b) State of Louisiana. These figures show that in percentage of earnings to sales, the Louisiana stores did better than the total stores in the years ending January 31, 1931 and January 31, 1932 and did worse in the years ending January 31, 1933, January 31, 1934 and January 31, 1935. In percentage of earnings to investment, Louisiana stores did better than total stores in the years ending January 31, 1931, January 31, 1932 and January 31, 1934 and did worse in the years ending January 31, 1933 and January 31, 1935. In earnings per store, Louisiana stores showed a worse result than the average of all stores in the years ending January 31, 1933 and January 31, 1935 and a better showing in the other years. The showings of [fol.116] stores varies widely from state to state and, where a company operates in so many states, average results furnish an uncertain standard of comparison for stores in a particular state. Stores in a given state may show better or worse results than average yet differ widely from stores in particular other states. Considering the disparity in wealth, population, purchasing power, tastes, habits and the like among the different states in which we

do business, there would be no basis in fact for any assumption that operations of a store in a given state furnish any indication of the probable operations in any other state. Our tax payments other than store taxes to the State of Louisiana for 1934 were as follows:

State, City and Parish license taxes	$3,013.20
State, City and Parish ad valorem taxes (Does not include Real Estate taxes paid under net leases.)	3,583.94
Franchise taxes	398.47
Income taxes	693.69

W. T. Grant Company, (Signed) R. W. Story, Comptroller.

Sworn to and subscribed before me at New York, N. Y., this 17th day of July, 1935. (Signed) Elsie E. Goetz, Notary Public. (Seal.)

[fol. 117]

EXHIBIT

Copy

W. T. Grant Company

Re Louisiana Chain Store Tax Litigation

	Fiscal year ended 1/31/31	Fiscal year ended 1/31/32	Fiscal year ended 1/31/33	Fiscal year ended 1/31/34	Fiscal year ended 1/31/35
			Total Company		
Sales	71,376,486.53	75,679,202.70	73,086,855.64	78,206,119.28	85,069,611.91
Expenses (Net)	68,027,312.77	72,573,304.25	71,498,358.14	74,973,642.52	82,542,925.07
Earnings	3,349,173.76	3,105,898.45	1,588,497.50	3,232,476.76	2,526,686.84
% to Sales	4.692	4.104	2.173	4.133	2.970
Total Assets	24,880,022.32	26,627,794.94	26,873,181.58	29,630,439.89	31,020,965.76
% Earnings to Total Assets	13.461	11.664	5.911	10.909	8.145
			State of Louisiana		
Sales	904,166.85	965,617.86	1,042,248.13	1,160,826.42	1,246,167.20
Expenses (Net)	844,919.61	907,117.40	1,032,834.60	1,120,495.65	1,226,357.79
Earnings	59,247.24	58,500.46	9,413.53	40,330.77	19,809.41
% to Sales	6.553	6.058	.903	3.474	1.590
Total Assets:					
Specifically allocated	174,480.17	213,293.37	256,230.66	225,333.76	240,834.87
Pro-rated	52,299.69	77,851.96	99,337.77	117,059.92	130,915.37
Total	226,779.86	291,145.33	355,568.43	342,393.68	371,750.24
% Earnings to Total Assets	26.125	20.093	2.647	11.779	5.329

[fol. 118] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF R. W. STORY—Filed May 28, 1936

UNITED STATES OF AMERICA,
State of New York,
County of New York:

R. W. Story being duly sworn, deposes and says:

My name is R. W. Story. I am comptroller of W. T. Grant Company and have executed an affidavit under date of July 17, 1935 with respect to operations of that Company in Louisiana and outside Louisiana. My attention has been directed to comments on this affidavit made by Mr. James D. Huck, Jr. in an affidavit executed by him under date of January 4, 1936, in which Mr. Huck notes some differences between the figures in my affidavit and figures in the income tax returns of W. T. Grant Company, and also suggests that the basis of proration of certain general expenses in my original affidavit is not correct.

As proof of the correctness of the figures in my original affidavit, I make the following further statement:

(1) Mr. Huck assumed in his affidavit that the total general charges of W. T. Grant Company for the fiscal year ending January 31, 1935 to be apportioned among all of its stores, including its Louisiana stores, was $737,615.61, being the figure shown on line 25-B of the Corporation's Federal income tax return. This is a mistake because the figure on line 25-B of the Federal return includes only a certain portion of our general expense. The total general expense of the Company for the fiscal year in question to be apportioned among all of our stores aggregates $2,130,274.72. I attach hereto as Exhibit A a recapitulation of the general administration expenses prorated to stores for the fiscal year ending January 31, 1935. All of these items were reported in our Corporation's Federal income tax return under various headings. The statement marked Exhibit A shows under what heading each of the items in question was reported in our Federal income tax return, and conclusively demonstrates that all of the expenses prorated among the stores were included in our Federal return, and that there is no basis for the statement by Mr. Huck that our Louisiana stores have been charged in our figures for general

administrative expenses with more than the average of the entire chain.

(2) In connection with Mr. Huck's comments on our depreciation charge, I attach a schedule marked Exhibit B, substantiating the deductions claimed for depreciation and amortization in our Louisiana income tax return. The book value of alterations and improvements shown in Item 23 of [fol. 119] this schedule was omitted from the balance sheet in that return, although the depreciation was separately itemized. The $180,655.21 of assets shown in the balance sheet in the Louisiana income tax return plus the $60,179.66 representing alterations and improvements equals $240,834.87, which was the amount of total assets designated in the affidavit as specifically allocated to Louisiana. Federal auditors have accepted the depreciation rates.

(Signed) R. W. Story.

Sworn to and subscribed before me this 10 day of February, 1936. (Signed) Lillian C. Worfolk, Notary Public. (Seal.)

[fol. 120]

Copy

EXHIBIT A

Reconciliation of General Administrative Expense

Pro-Rated to Stores and Reported in Federal Return

General Administrative Expense Pro-Rated to Stores		Same Items Included in Federal Return Under		
Item	Amount	Item No.	Amount	Item 25(b)
General Administrative:				
Salaries and Wages	$1,323,541.30	15 & 25 (a)	$1,323,541.30	.....
General Expense: Sales Promotion, District Offices, Display Studio, Buying & Sample, Construction, Fixtures, Office Management, Secretary & Legal, Personnel, Real Estate, Traffic, Standards, Etc.	80,979.48			80,979.48
Travelling Expense & Allowances	168,959.44			168,959.44
Stationery & Postage	97,475.81			97,475.81
Rent	93,965.52	16	93,965.52	
Federal Capital Stock & Check Taxes	44,776.54	19	44,776.54	
Legal Fees & Services	36,290.98			36,290.98
Financial Service & Publicity	15,134.46			15,134.46
Office Maintenance, Equipment, Supplies	52,672.01			52,672.01
Contributions & Gifts	25,828.14	L	305.00	25,523.14
Machine Rental, Maintenance, Supplies	34,886.17			34,886.17
Telephone & Telegraph	31,673.57			31,673.57
Wilmark Service	25,780.00			25,780.00
Subscriptions & Dues	25,224.17			25,224.17
Auditing Fees	13,809.99			13,809.99
Alteration & Improvement Amortization	9,792.46	23	9,792.46	
Furniture & Fixture Depreciation	579.53	23	579.53	
Light	8,286.08			8,286.08
Freight & Expense	6,380.47			6,380.47
Experimental Store & Fixture Expense	4,145.69			4,145.69

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EXHIBIT A—Continued

Reconciliation of General Administrative Expense

Pro-Rated to Stores and Reported in Federal Return

General Administrative Expense Pro-Rated to Stores			Same Items Included in Federal Return Under	
Item	Amount	Item No.	Amount	Item 25(b)
General Administrative:				
Employees & Mds. Accts. Written Off	1,538.72		1,538.72	
Miscellaneous	28,554.19			28,554.19
Total—General Administrative Expense pro-rated to Stores	$2,130,274.72	=	$1,474,499.07	+$655,775.65
Add Expenses Charged to Surplus:				
Cancellation of Long Term Leases				79,317.98
Cost of Settlement of Damage Claim				2,519.98
Total General & Administrative Expenses per Item 25 (b) of Federal Return				$737,613.61

Recapitulation

General and Administrative Expense per Federal Return	737,613.61
Deduct Expenses Charged to Surplus Included Therein	81,837.96
Difference—Amount Charged to Earnings	655,775.65
Add General Administrative Expenses Reported Under Other Headings of Federal Return	1,474,499.07
Total General Administrative Expense per Books Pro-rated to Stores	2,130,274.72
Proportion Charged Louisiana Stores on Basis of Sales	x .014649
Amount Charged Louisiana Stores per Books and per Louisiana Return	$31,206.40

(Sgd.) R. W. Story.

[fol. 121]

Copy

EXHIBIT B

Charges Against Earnings for Depreciation and Amortization

Year Ended January 31, 1935

Louisiana Stores

	Alexandria	Baton Rouge	Monroe	New Orleans	Shreveport	Total
			Furniture and Fixtures			
Ten-Year Life:						
1. Cost February 1, 1934	$8258.45	$12002.34	$8536.35	$43740.48	$15922.19	$88459.81
2. Additions During Year	(62.90)	33.83	10.20	250.36	164.50	395.99
3. Cost January 31, 1935	8195.55	12036.17	8546.55	43990.84	16086.69	88855.80
4. Depreciation Prior Years	1679.88	1903.88	1206.68	40348.23	10716.17	55849.84
5. Depreciation Current Year	821.90	1201.93	853.64	3028.94	1598.26	7494.67
6. Total Depreciation	2501.78	3105.81	2060.32	43367.17	12309.43	63344.51
7. Book Value 1/31/35	5693.77	8930.36	6486.23	623.67	3777.26	25511.29
Five-Year Life:						
8. Cost February 1, 1934	165.10	3631.52	2706.76	350.72	.....	6854.10
9. Additions During Year	220.25	16.31	4.93	1013.20	90.03	1344.72
10. Cost January 31, 1935	385.35	3647.83	2711.69	1363.92	90.03	8198.82
11. Depreciation Prior Years	.....	1095.39	750.76	.....	.....	1846.15
12. Depreciation Current Year	47.52	726.30	541.85	187.71	9.00	1512.38
13. Total Depreciation	47.52	1821.69	1292.61	187.71	9.00	3358.53
14. Book Value 1/31/35	337.83	1826.14	1419.08	1176.21	81.03	4840.29
			Deferred Charges			
			Alterations and Improvements			
15. Cost February 1, 1934	.....	.....	.....	67329.51	42520.95	109850.46
16. Additions During Year	.....	.....	.....	.....	.....	.....
17. Cost January 31, 1935	.....	.....	.....	67329.51	42520.95	109850.46
18. Amortization Prior Years	.....	.....	.....	32112.24	12122.66	44234.90

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EXHIBIT B—Continued

Charges Against Earnings for Depreciation and Amortization

Year Ended January 31, 1935

	Louisiana Stores					
	Alexandria	Baton Rouge	Monroe	New Orleans	Shreveport	Total
19. Amortization Current Year	.....	.....	.....	3707.08	1728.82	5435.90
20. Total Amortization	.....	.....	.....	35819.32	13851.48	49670.80
21. Book Value	.....	.....	.....	31510.19	28669.47	60179.66
	Totals					
Book Values 1/31/35	6031.60	10756.50	7905.31	1799.88	3858.29	30351.58a
22. Furniture and Fixtures	.....	.....	.....	31510.19	28669.47	60179.66d
23. Alterations and Improvements	6031.60	10756.50	7905.31	33310.07	32527.76	90531.24
24. Total						
Depreciation & Amortization 1934	869.42	1928.23	1395.49	3211.65	1602.26	9007.05b
25. Furniture and Fixtures	.....	.....	.....	3707.08	1728.82	5435.90c
26. Alterations and Improvements	869.42	1928.23	1395.49	6918.73	3331.08	14442.95
27. Total						

(a) Per Item 8 of Schedule K of Louisiana Income Tax Return.
(b) Per Schedule I of Louisiana Income Tax Return.
(c) Per Schedule I of Louisiana Income Tax Return.
(d) Omitted from Balance Sheet—Schedule K of Louisiana Income Tax Return.

(Sgd.) R. W. Story.

[fol. 122] AFFIDAVIT OF R. W. STORY—Filed May 28, 1936

UNITED STATES OF AMERICA,
State of New York,
County of New York:

Before me, the undersigned authority, a Notary Public duly commissioned and qualified in and for the aforesaid County and State, this day personally came and appeared R. W. Story, who being first duly sworn, did depose and say:

Since making my affidavit of February 10th, my attention has been called to the following statement made by Mr. James D. Huck, Jr., in his affidavit of January 4th, 1936:

"It is generally the practice of chain store operators to invoice its branches for merchandise shipped to them at such a price as will allow a profit to the main office. This method of merchandising increases the cost of the goods sold by the branch and reduces the gross profit of the branch store and reduces ultimately its net income or tends to create a loss."

More than ninety-eight (98) per cent of the purchases of W. T. Grant Company are made by the stores on orders placed directly by the stores with manufacturers and/or wholesalers. The manufacturers and/or wholesalers of the merchandise bill the stores direct for the merchandise so ordered from them. It follows, therefore, that W. T. Grant Company does not, in the case of somewhat over ninety-eight (98) per cent of its purchases "invoice its branches for merchandise shipped to them" at all, and hence cannot "invoice its branches for merchandise shipped to them at such a price as will allow a profit to the main office."

W. T. Grant Company leases space at the Bush Terminal, Brooklyn, New York. Bulk shipments of imported merchandise are received at this point and from this point distributed in smaller lots to the stores. Occasionally, when it is necessary to accept delivery of domestic merchandise in advance of the season in which it will be sold, domestic merchandise is also accepted at the Bush Terminal and from there is distributed to the stores when the merchandise is in season. Of the total of W. T. Grant Company store pur-

chases, however, somewhat less than 2% clear through this distributing depot.

Imported merchandise distributed to the stores from the [fol. 123] Bush Terminal is billed to the stores at a price calculated to adequately cover the landed cost of the merchandise. Domestic merchandise is billed to the stores at the market price at the time of shipment. In the latter case it will be observed that the market price at the time of shipment to the stores may be greater or less than the cost of the merchandise when delivery was first accepted at the Bush Terminal.

As the result of these operations a small profit ordinarily accrues at the Bush Terminal distributing point. Contrary to the statements in Mr. Huck's affidavit, this profit is not reserved either to the distributing point or to our main office but is prorated among the stores. The profit figures for the Louisiana stores given in my affidavit of July 17, 1935 reflected the proportionate share of the Louisiana stores in the so-called profit which resulted from this method of merchandise distribution.

R. W. Story.

Sworn to and subscribed before me at New York, N. Y., this 20 day of February, 1936. Lillian C. Worfolk, Notary Public.

[fol. 124] Copy

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF H. D. KITTINGER—Filed May 28, 1936

UNITED STATES OF AMERICA,
State of New York,
County of New York, ss:

H. D. Kittinger, being duly sworn, deposes and says:

My name is H. D. Kittinger. I am over twenty-one years of age and reside at 902 Broadway, New York, N. Y. I am Vice President of H. L. Green Company, Inc. and have been connected with that company three years.

H. L. Green Company, Inc. is a corporation organized under the laws of New York and is engaged in the business of selling at retail articles of merchandise retailing at

prices not exceeding $1. It operates in thirty-three states and the District of Columbia a total of 128 stores. One of the stores operated by H. L. Green Company, Inc. is situated in the City of Shreveport, Louisiana and known under the trade name of Isaac Silver & Bros. Attached hereto is a list marked "Exhibit A" showing the other States in which H. L. Green Company, Inc. operates stores and the number of stores operated in each State.

H. L. Green Company, Inc. commenced its operations in Louisiana in July 1933. The fiscal year of the Company ends on January 31st, and the first complete fiscal year covering operations in Louisiana was the year ending January 31, 1935. The following is a comparison of the results in Louisiana in that year as compared with results of the entire system (cents omitted):

	Entire Company	Louisiana
Gross revenues	$26,824,127	$168,627
Cost of merchandise and operating expenses	25,217,854	160,454
Net Earnings before Federal Income Tax	$1,606,273	$8,173
Capital Invested	6,307,851	43,899
Per Cent Earned on Invested Capital	25.5%	18.6%

The above figures (which are before deduction for Federal Income Taxes) show that the average profit per store for the entire system in the year ending January 31, 1935 was $12,549, while the profit of the Louisiana store in that year was $8,173. Stores throughout the country vary widely in results from State to State because of differences in local conditions, economic and otherwise, freight rates adding to cost, remoteness from headquarters and executive management, increase in difficulty of supervision, local competition and many other factors.

The taxes of H. L. Green Company, Inc. in Louisiana, [fol. 125] apart from chain store taxes, are very much heavier than the taxes elsewhere. During the fiscal year

ended January 31, 1935, the Louisiana taxes, excluding chain store taxes, aggregated $1,195.36, which was .71% of Louisiana sales. The Company's total taxes, excluding chain store taxes, amounted to .36% of the Company's total sales. The taxes paid the State of Louisiana, exclusive of chain store taxes, therefore practically doubled the average taxes paid by the Company in all the thirty-two States in which it does business.

The Company's capital invested in Louisiana on January 31, 1935 was approximately $44,000, and the number of persons employed in Louisiana was forty-eight.

The kind of business which H. L. Green Company, Inc. engages in in Louisiana is the same kind of business as that conducted by Morgan & Lindsey, a Texas corporation, which operates stores selling goods at prices up to $1 in Louisiana, Mississippi, Arkansas and Texas, chiefly in Louisiana, where it operates twenty-seven stores at as many points in the State. According to the financial statement of Morgan & Lindsey, it has total assets exceeding $750,000. Under the tax proposed by the Louisiana statute of 1934, Morgan & Lindsey for operating twenty-seven stores in Louisiana would pay a tax of $10 per store on the first nine and $15 per store on the next eighteen, or a total of $360 for twenty-seven stores, or slightly over $13 per store, while the chain store tax assessed upon H. L. Green Company, Inc. for operating one store in Louisiana is $100. The H. L. Green Company, Inc. enjoys no advantage over Morgan & Lindsey in operation, while on the contrary the latter company has the benefit of operating in a more limited area under closer supervision and in closer contact with local taste and conditions.

(Sgd.) H. D. Kittinger.

Sworn to and subscribed before me at New York, N. Y. this 27th day of May, 1935. (Sgd.) Anne E. Bossler. (Seal.)

[fol. 126] Copy

EXHIBIT A

H. L. Green Company, Inc.

List of Stores by States as of February 1, 1935 (Excluding Louisiana)

State	No. of Stores
Alabama	4
Connecticut	4
Delaware	1
Washington, D. C.	1
Florida	2
Georgia	8
Illinois	2
Indiana	1
Iowa	2
Kentucky	1
Maryland	2
Massachusetts	7
Michigan	3
Minnesota	2
Montana	1
Nebraska	1
New Jersey	11
New York	21
North Carolina	4
Ohio	4
Oklahoma	2
Oregon	1
Pennsylvania	18
Rhode Island	1
South Carolina	3
Tennessee	1
Texas	4
Vermont	1
Virginia	1
Washington	4
West Virginia	2
Wisconsin	6
Wyoming	1
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[fol. 127] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF H. D. KITTINGER—Filed May 28, 1936

UNITED STATES OF AMERICA,
State of New York,
County of New York:

H. D. Kittinger being duly sworn, deposes and says:

My name is H. D. Kittinger, and I have heretofore under date of May 27, 1935, made an affidavit in connection with the operation of H. L. Green Company, Inc. to be offered in evidence in the litigation with respect to the validity of the Louisiana chain store tax statute of 1934. I have read the comments of Mr. James D. Huck, Jr., accountant for the State, upon my earlier affidavit, and desire to give the following supplemental testimony.

Mr. Huck calls attention to a difference of $2,373,388.84 between the sales reported in my earlier affidavit and the sales shown in the Federal income tax return, a copy of which was filed in Louisiana. This difference results from sales of food products, which in our operating statements we do not include as sales because of the especially low gross profit made thereon. The net profit from this department is shown by us in our operating statement as other income. The purpose of this is not to disturb our operating percentages. However, the net income as reported is correct. Moreover, our Federal income tax return covers the operations only of H. L. Green Company, Inc. since consolidated returns are no longer permitted by the Federal law, while our operating figures shown in our reports to stockholders include the operations of a small Virginia corporation and the operation of two small realty corporations. In order to make an intelligent comparison, the consolidated figures must be used. I attach to this affidavit as Exhibit A a statement which shows the comparison on this basis. This statement is not precisely comparable to our Federal income tax return because on our books we deducted over $111,000 for depreciation, whereas on our tax return we deducted only $30,000, and on our tax return we included approximately $10,000 in income which, on our books, we credited directly to surplus. The attached statement marked Ex-

hibit A is however an accurate operating statement on a consolidated basis.

Mr. Huck also contends that the earnings of our Louisiana stores as shown in my original affidavit did not contain a proper credit for discount on purchases or any of the other items of revenue applying to the whole chain. In my [fol. 128] original affidavit we made an allowance for discounts to Louisiana through the adjustment of overhead as follows: In computing our overhead, the total was reduced by the amount of purchase discount earned, and we then allocated the balance as overhead expense to our various stores on a basis of sales. Upon further consideration we believe that this does not give the Louisiana stores the full credit for purchase discounts, and we have therefore on the amended statement marked Exhibit A computed the two items of overhead and purchase discount separately, the overhead being 3.6527% of regular and cafeteria sales and the purchase discount being .70718%. The net effect of this change is to increase the profit in the State of Louisiana from $8,173 to $8,645.51. The following is a precise statement of the allocation of purchase discount to Louisiana:

Total purchase discount	$189,696.90
Percentage earned on regular and cafeteria sales (no discount on food product purchases)	.70718%
Allocated to Louisiana .70718×166,472.84=	1,177.26

In Mr. Huck's affidavit he undertakes to adjust the income of our system by eliminating from our system income certain general items detailed by him under the heading "Other Income—Schedule 13". The bulk of these other items is made up of income from concessions, which consist of rentals from leased departments and discounts on purchases. Louisiana has been credited for its proportionate share of the purchase discount and with its actual income from rental of leased departments, and there is no reason to exclude these items from the income of the system as a whole for purposes of comparison. It would be correct to eliminate the item of "Sundry Income" aggregating $32,462.82, and on the attached statement marked Exhibit A it has been eliminated before striking the comparison

between Louisiana operations and operations as a whole. The attached statement shows that on operations as a whole the average income per store for the 128 stores (which includes the one Louisiana store) was $12,291.40, while the operating income of the one Louisiana store was $8,645.51. The attached statement also shows that the gross profit of Louisiana is approximately 3½% less than average. The poor showing of the Louisiana store is due in part to the heavy freight charges for shipments to Louisiana because of the distance from the markets (which was assigned by Mr. Huck in his affidavit as the probable explanation of the poor showing of the Louisiana store even upon his analysis). The actual [fol. 129] freight cost in Louisiana is 3.93% of sales, while the average freight for the entire system is only 1.99%, a difference of almost 2%. Another reason for the poor showing in Louisiana is that the cafeteria of our Louisiana store operates on about a 35% gross profit as compared with practically a 50% gross profit for the entire chain. This difference is presumably due to local competition, and merely indicates the wide difference in conditions from state to state.

As to Mr. Huck's claim that the chain stores have a practice to invoice branches at a profit, this is not the practice with our Company, and as far as our information goes, it is not generally the practice in our type of chain store. As a matter of fact, some chains, while they charge the branch stores the actual cost of the merchandise, charge an average amount for freight. This practice would be to the benefit of the branch store in Louisiana and not against it, but even with respect to this item, it is our policy to charge the exact transportation cost to each individual store.

H. D. Kittinger.

Sworn to and subscribed before me at New York, N. Y. this 24th day of February, 1936. Anne E. Bassler, Notary Public.

[fol. 130] EXHIBIT "A"

H. L. Green Company, Inc.

Comparison of Operations, February 1, 1934, to January 31, 1935

	Entire company	Louisiana #125
Regular merchandise and cafeteria sales	26,824,127.54	166,472.84
Food Product sales	2,449,643.69	86,386.27
Total sales	29,273,771.23	252,859.11
Cost of merchandise and operating expenses	28,356,591.40	247,981.64*
Less rentals from:		
Leased departments	466,933.64	2,590.78
Discount on purchases	189,696.90	1,177.26
Sundry income	32,462.82	.....
	689,093.36	3,768.04
Net cost of merchandise & expense	27,667,498.04	244,213.60
Net Profit before Federal Income Tax	1,606,273.19	8,645.51
Less: Net Income not arising from regular operations	32,462.82	.....
Total Operating Income before taxes	1,573,810.37	8,645.51
Average per store—128 stores	12,295.40	8,645.51

Gross Profit Comparison

Gross Profit on sales—	entire company	% to sales	Louisiana	% to sales
Regular & Cafeteria	9,101,014.00	33.93%	50,692.83	30.45%
Food Products	305,894.56	12.49	9,147.59	10.59
	9,406,908.56	32.13%	59,840.42	23.67%

* Includes actual expenses and cost of merchandise sold in Louisiana and proportion of general overhead in the amount of $5,930.93. For further details see amended Louisiana Income Tax Return.

[fol. 131] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF PHOENIX S. FRANKS—Filed May 28, 1936.

UNITED STATES OF AMERICA,
State of New York,
County of New York:

Phoenix S. Franks, being duly sworn, deposes and says: My name is Phoenix S. Franks. I am thirty-seven years of age and reside at 4445 Hill Avenue, Mt. Vernon, New York. I am Vice-President and in charge of the accounts of G. R. Kinney Co., Inc., and have been connected with that Company for twelve years.

G. R. Kinney Co., Inc., is a corporation organized under the laws of New York and is engaged in the business of selling shoes at retail. On January 1, 1935 the Company operated a total of 330 stores in thirty-seven States. There is attached hereto a list marked "Exhibit A" showing the number of stores operated in each State. At January 1, 1935 the Company operated three stores in Louisiana, one each at Alexandria, Baton Rouge and New Orleans.

Attached hereto marked "Exhibit B" is a statement comparing results of the entire operations of the Company from the years 1930 to 1934 inclusive with the operations of the Company in Louisiana during that period. As shown by this statement, the earnings of the Louisiana stores as units have been greatly less than the average earnings of all stores, and the return on values invested in Louisiana has been greatly less than the return on the Company's entire investment. There is also attached marked "Exhibit C" a statement comparing the result of operations of the Louisiana stores for ten years past with the result of the operations of the entire chain for that period. These figures show that for the period of ten years there was only one year in which Louisiana stores made a better showing than the stores of the system as a whole, and that in each of the other nine years the showing of the Louisiana stores was very much worse than the showing of the stores of the entire system. These results reflect the difference in condition of operation of the Company's three stores in Louisiana as compared with stores outside of Louisiana, due to differences in conditions prevailing in different localities, buying power of local population, local taste and conditions, local management, outside competition, freight rates increasing with remoteness from Company's sources of merchandise, increased difficulty of supervision with remoteness, and numerous other factors.

[fol. 132] The three stores which the G. R. Kinney Co., Inc. operates in Louisiana are in competition at each point with individual stores operated by local merchants or by local chains. These competing stores are subjected to a tax under the Louisiana statute of 1934 at a rate not exceeding $10 per store, while the Kinney Company is subjected to a tax of $450 on each of its stores in Louisiana under that statute. The Kinney Company enjoys no advantage in competition over local merchants and local chains in

Louisiana which would remotely support this discrimination in tax. Many of the local merchants and chains have much larger volumes of sale- in Louisiana and make much larger profits than the Kinney Company. Such competing stores have the advantage of local supervision and management and are able to purchase as advantageously as the Kinney Company.

The taxes paid by the Kinney Company in Louisiana in 1934, exclusive of taxes under the chain store statute of 1934, were approximately $953.

(Signed) Phoenix S. Franks.

Sworn to and subscribed before me at New York, N. Y. this 31st day of May, 1935. (Signed) Marvin Arnold, Notary Public. (Seal.)

[fol. 133] Copy

EXHIBIT A

G. R. Kinney Co., Inc.

Number of Stores Operated in Each State as at January 1st, 1935.

Alabama	4	Missouri	7
Arkansas	4	Nebraska	5
Connecticut	12	New Hampshire	3
Delaware	1	New Jersey	5
Dist. of Col.	5	New York	41
Florida	3	North Carolina	11
Georgia	6	North Dakota	1
Illinois	27	Ohio	17
Indiana	9	Oklahoma	4
Iowa	14	Pennsylvania	45
Kansas	6	Rhode Island	2
Louisiana	3	South Carolina	2
Maine	2	South Dakota	1
Maryland	2	Tennessee	5
Massachusetts	9	Texas	9
Michigan	16	Vermont	1
Minnesota	9	Virginia	7
Mississippi	2	West Virginia	6
		Wisconsin	24

[fol. 134]

EXHIBIT B

G. R. Kinney Co., Inc.

Re: Louisiana Chain Store Tax Litigation

Entire Corporation

	1930	1931	1932	1933	1934
Gross	$17851833.	$14023996.	$11869004.	$12185176.	$13184177.
Expenses	17749640.	14709767.	12439007.	12250785.	13011630.
Earnings	102193.	685771.x	590003.x	65609.x	172547.
Earnings on Sales	.0057	.0489 x	.0497 x	.0054 x	.0131 x
Values	8174339	5982343.	4236469.	4032752.	3623978.
Earnings on Values	.0125	.1146 x	.1393 x	.0163 x	0476

State of Louisiana

	1930	1931	1932	1933	1934
Gross	$171649.	$142053.	$122067.	$142238.	$135345.
Expenses	173317.	155201.	132869.	143933.	135670.
Earnings	1668.x	13148.x	10802.x	1695.x	325.x
Earnings on Sales	.0097x	.0926x	.0885x	.0119x	.0024x
Values	70500.	54269.	41936.	41542.	30869.
Earnings on Values	.0237x	.2422x	.2576x	.0408x	.0105x

x-Denotes red ink figures.

fol. 135]

EXHIBIT C

(G. R. Kinney Co., Inc.)

Comparison of Average Yearly Net Earnings per Store for Louisiana Stores with the Chain as a Whole for the Last Ten Years

Year	Average Net Earnings: Louisiana stores		Chain as a whole		Comparison								
1924	$65	Loss	$502	Profit	La. Stores	worse	showing by	$567	each	=	112.9%
1923	365	Loss	176	Loss	"	"	"	189	"	=	107.4%
1922	2160	Loss	1455	Loss	"	"	"	705	"	=	48.5%
1921	2629	Loss	1662	Loss	"	"	"	967	"	=	58.2%
1920	356	Loss	265	Profit	"	"	"	621	"	=	234.3%
1929	1330	Profit	2775	Profit	"	"	"	1445	"	=	52.1%
1928	3168	Profit	2797	Profit	"	better	"	371	"	=	.....
1927	1358	Profit	2827	Profit	"	worse	"	1469	"	=	52.0%
1926	415	Profit	2198	Profit	"	"	"	1783	"	=	81.1%
1925	554	Profit	4925	Profit	"	"	"	4371	"	=	88.8%
Ten Year Total	$1250	Profit	$12995	Profit	"	"	"	11746	"	=	90.4%
Yearly Average	$125	"	$1299.60	"	"	"	"	1174.60	"	=	90.4%

[fol. 136] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF PHOENIX S. FRANKS—Filed May 28, 1936

UNITED STATES OF AMERICA,
State of New York,
County of New York:

Phoenix S. Franks being duly sworn, deposes and says:

My name is Phoenix S. Franks. I am Vice-President and in charge of the accounts of G. R. Kinney Company, Inc., and have heretofore executed an affidavit under date of May 31, 1935 with respect to that Company and its operations generally and in the State of Louisiana. I have had exhibited to me a copy of an affidavit made by James D. Huck, Jr., a certified public accountant, under date of January 4, 1936 commenting upon my affidavit and suggesting that there are some discrepancies between the figures contained in that affidavit and the figures contained in the Company's income tax return for 1934. These suggestions are unfounded as is shown by the following statement:

(1) The difference between the 13 million sales reported in affidavit and 11 million sales reported on tax return is the sales made to outside companies by our factories (which are reported as wholly owned subsidiaries) which, due to the change in the Federal Income Tax Law of prohibiting consolidated tax returns, were not reported on the individual Federal income tax return for the year of 1934, copy of which the State of Louisiana requested to be filed with the State income tax report. It is customary procedure to give complete sales of the entire organization including all departments, some of which are reported by our wholly owned subsidiary companies. It will, therefore, be seen that the figures reported on the Federal tax return are correct, as well as the figures reported in the affidavit.

(2) Mr. Huck's affidavit undertakes to recompute the average earnings per store, using as a basis 330 stores and reaching a different result for average earnings per store from the figures set out in my original affidavit. This difference is due to the fact that the State uses as its basis for the computation of average earnings per store over the entire system the number of stores, which was in operation on January 1, 1935 (330), whereas in my original affidavit

I used the average number of stores in operation during 1935, which was 343.5 stores. It is obvious that the earnings for 1935 were made by the entire number of stores in operation during the year and, in view of the fact that that number increased after January 1, 1935, the average earnings per store are to be correctly determined by dividing [fol. 137] the total revenue by the average number of stores in operation during the year which made those earnings. The average of 343.5 stores in operation in 1934 when divided into the total profit of $172,547 shows average earnings per store of $502, the amount stated in my original affidavit, as compared with a loss of $65 per store for the Louisiana stores.

Phoenix S. Franks.

Sworn to and subscribed before me this 5th day of February, 1936. Marvin Arnold. Notary Public. (Seal.)

[fol. 138] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF IRVING F. STROM—Filed May 28, 1936

UNITED STATES OF AMERICA,
State of Oklahoma,
County of Oklahoma, ss:

Irving F. Strom, being first duly sworn, makes the following statement under oath:

My name is Irving F. Strom. I reside at 1812 Oakdale Street, Houston, Texas. I am 43 years of age. I am District Manager of the Liggett Drug Company, Inc. My duties as District Manager include supervision of the stores of Liggett Drug Company, Inc., in the State of Louisiana. Liggett Drug Company was organized under the laws of the State of Delaware on December 30, 1933, and began operations in Louisiana as of January 1, 1934.

On January 1st, 1935, Liggett Drug Company, Inc. (owning and operating 373 stores), and its subsidiaries, May Drug Company, a Pennsylvania corporation, (owning and operating 20 stores), Illinois Liggett Drug Company, an Illinois corporation, (owning and operating 30 stores), and Liggett Drug Company of Michigan, a Michigan corporation, (owning and operating 29 stores), owned and operated a total of 452 stores situated in 33 States and the Dis-

trict of Columbia, of which 6 stores were located in the State of Louisiana.

The locations of the stores in the State of Louisiana were as follows: In New Orleans, there are three stores, situated at 840 Canal Street, 200 St. Charles Street and 1001 Canal Street. In Baton Rouge, Shreveport and Alexandria, there is one store each. Under the Louisiana Chain Store Act of 1934, a special chain store tax is levied against the Liggett stores of Louisiana by reference to the total number of Liggett stores in the world and the Louisiana tax is fixed at $500.00 per store for each of the 6 Liggett stores in Louisiana.

In New Orleans, the Liggett stores are in direct competition with the stores of Katz & Besthoff, Ltd., Economical Drug Stores, Inc., and American Drug Stores, Inc., and in Shreveport in direct competition with the stores of Morris & Dickson. In addition, of course, Liggett competes at all points with independent drug stores.

Katz & Besthoff, Ltd., operate 10 stores in the State of Louisiana, all of which are located in the City of New Orleans. Under the Louisiana 1934 Chain Store Law, each of the Katz & Besthoff stores is required to pay a special chain store license tax of $10.00 per store as compared with the $500.00 per store imposed by the law against the Liggett stores in Louisiana. A financial report shows that [fol. 139] Katz & Besthoff both had at December 31, 1933, assets amounting to $991,000.00. Liggett's total investment in Louisiana is approximately $100,000.00. Katz & Besthoff, Ltd., maintain much larger inventories and have much larger warehouse facilities than Liggett's stores in Louisiana or any comparable Liggett stores elsewhere. Louisiana has a general license law which imposes a license tax on all persons, firms and corporations pursuing any trade or business. This is Act 190 of 1932. That Act provides for different licenses on different classes of business. The section of that Act applicable to the general business of drug stores is Section 9 which provides for a license on the business of selling merchandise at retail and provides for licenses fixed according to gross sales, the amount of license tax changing with gross sales according to certain classes. I attach to this affidavit a copy of Section 9 of this statute showing the classes established by the statute. The statute requires a separate license for each separate

store and requires that before March 1st. of each year every concern doing business must file an affidavit showing the amount of gross sales for the preceding year upon which its license tax for the current year should be fixed. It is customary in filing these affidavits to specify the maximum bracket within which the gross sales would fall. In order to make a comparison of the Liggett business in Louisiana with the business of Katz & Besthoff, I have obtained from the public records the sales of Katz & Besthoff for the year 1934 as reported by them as a basis for licenses and I attach hereto, marked Exhibit "A" a statement showing the sales as reported by them upon which I have also indicated the sales reported by Liggett Drug Company, Inc. This statement shows that Katz & Besthoff's 10 stores reported sales of an aggregate minimum of $1,225,000.00 and an aggregate maximum of $1,775,000.00 while the three Liggett drug stores had an aggregate minimum sales volume of $216,000.00 and an aggregate maximum sales volume of $260,000.00. I also attach as Exhibit "B" a statement made up from the license affidavit records covering sales for 1934, (which is also based upon the license affidavits) comparing the sales of each of our three Liggett stores with the nearest Katz & Besthoff store. This statement shows that our store at 840 Canal Street had an aggregate sales volume in 1934 not exceeding $110,000.00, while the Katz & Besthoff store, right across the street, at 841 Canal Street had an aggregate sales volume not exceeding $345,000.00. Our store at 1001 Canal Street reported sales not exceeding $85,000.00 while the Katz & Besthoff store at 732 Canal Street, three blocks away, reported sales not exceeding $205,000.00. Our store at 200 St. Charles Street reported sales not exceeding $65,000.00, [fol. 140] while the Katz & Besthoff store, two blocks away at 235 Carondelet Street reported sales not exceeding $85,000.00.

In 1934, Economical Drug Stores, Inc., operated 15 drug stores in the State of Louisiana, all of which are located in the City of New Orleans. The store at 1011 Canal Street, in the same block as our store at 1001 Canal Street, reported in its license affidavit that its sales of confections were $18,288.00 and of drugs were $106,298.00, or a total of $124,586.00, while the sales of the Liggett store in the same block, including confections, restaurant and drugs, were

only $79,248.00. Under the Louisiana 1934 Chain Store Law, the first 10 stores of Economical Drug Company pay a license tax of $10.00 per store and the next 5 pay $15.00 per store as compared with the $500.00 tax per store imposed on Liggett.

In 1934, American Drug Stores operated 5 drug stores in the State of Louisiana, all of them in the City of New Orleans. Of these the largest was at 1024 Canal Street, across the street from our store at 1001 Canal Street. The license affidavit of the American Drug Stores shows that its sales of retail drugs in 1934 were fixed at a maximum of $150,000.00 and its sales of soft drinks were fixed at a minimum of $15,000.00, or an aggregate maximum of $165,000.00 as compared with our aggregate reported maximum of $85,000.00. Under the Louisiana 1934 Chain Store Law, each store of the American Drug Stores pay a chain store license tax of $10.00 as compared with a $500.00 per store tax imposed against Liggett.

The total sales of Liggett's six stores in Louisiana, including those in New Orleans, in the year 1934 aggregated $599,024.21. The 10 stores of Katz & Besthoff in the City of New Orleans in 1934 undoubtedly sold more than twice the 6 stores of the Liggett Drug Company, Inc., in the entire State of Louisiana. Katz & Besthoff, Ltd., buy in large quantities so that they are able to get the same discounts as Liggett Drug Company, Inc., and they buy as cheaply as Liggett. In the drug trade, quantity discounts do not become any greater after a certain point is reached. Usually the maximum quantity discount will be obtainable in purchasing in gross lots and one purchasing 1000 gross will get no better discount than one purchasing 10 gross. Katz & Besthoff, Ltd., sell at the same prices as Liggett. Katz & Besthoff, Ltd., manufacture themselves and put up and sell under their own names a large number of items on which they make a special profit and undoubtedly their profit on such items is as large as Liggett's profits on items on which Liggett has the exclusive agency in Louisiana, if [fol. 141] not larger. Katz & Besthoff, Ltd., have the advantage of local acquaintance and contacts and close personal supervision and management. Liggett is subjected to considerable expense for supervision which is not required by Katz & Besthoff, Ltd., and the direct management of the owners residing in New Orleans is not only

cheaper but more efficient and effective. The Katz & Besthoff drug stores are organized and operated as effectively as any drug chain could be. They have every advantage in quantity buying, buying for cash and obtaining cash discounts, skill in buying, stock in stores, warehousing of goods, supply of capital, pricing and sales policy, accounting methods, uniformity in store management, display and advertising and standardization which Liggett or any other chain has or could have. Any person familiar with their stores and methods could attest to this as being true. In addition, they have the great advantage of being a local institution.

The net income of the six Liggett stores in Louisiana in 1934 was (after payment of Federal taxes), $17,725.00. The net income in that same period of Katz & Besthoff's stores is not known to me but could be ascertained from income tax reports and I think undoubtedly was very much more. This income tax information is filed with the Supervisor of Public Accounts and is known to that official.

Economical Drug Stores, Inc. operate fifteen drug stores in the City of New Orleans which are also in direct competition with Liggett Drug Company, Inc. They also have the advantage of large purchasing power and chain store organization. They are also direct purchasers in large quantities and obtain the best quantity discounts. They also enjoy the advantage of local management and supervision. These circumstances also apply to American Drug Company, Inc. which has a chain of five drug stores in the City of New Orleans.

In Shreveport, the Morris and Dickson Company has drug stores which compete with Liggett's one store in Shreveport and has every advantage that Liggett has, in addition to being a local institution in Shreveport.

Approximately 25% of Liggett's sales in Louisiana are soda fountain sales, including sandwiches. Approximately 85% of the supplies for this business are bought locally, the ingredients being ice cream, milk, bread and meats, etc. Katz & Besthoff, Ltd., and the other chains above specially referred to do an even larger soda fountain business than does Liggett and buy supplies, therefore, locally in larger quantities and perhaps at a better discount than does Lig-

[fol. 142] gett because in this class of a perishable merchandise, larger purchases usually mean better prices although it is not so as to staple drug items. In addition to the soda fountain sales, approximately 10% of Liggett's other sales represent goods purchased locally to replenish stocks in view of the general Liggett rule against carrying more than a two weeks stock. Such purchases are frequently made in very small units in which all discounts are lost.

(Signed) I. F. Strom.

Sworn to and subscribed before me at Oklahoma City, Oklahoma, this 16th day of July, 1935. (Signed) Fern Sautbine, Notary Public. My commission expires 9-21-35.

[fol. 143] Louisiana Act 190 of 1932

Section 9

Section 9. That for every business of selling merchandise at retail, not otherwise provided for by this Act or by special laws, whether the business be conducted as principal, agent on commission or otherwise, the license shall be fixed and graded in classes, and for each separate establishment where more than one such establishment is kept or conducted by the same person, firm, association or corporation, there shall be a separate license, as herein fixed and graded as follows, to-wit:

First Class—When the gross sales are five million dollars or more, the license shall be six thousand dollars ($6,000.00).

Second Class—When the gross sales are four million five hundred thousand dollars or more, and less than five million dollars, the license shall be five thousand four hundred dollars ($5,400.00).

Third Class—When the gross sales are four million dollars or more, and less than four million five hundred thousand dollars, the license shall be four thousand eight hundred dollars ($4,800.00).

Fourth Class—When the gross sales are three million five hundred thousand dollars or more, and less than four million dollars, the license shall be four thousand two hundred dollars ($4,200.00).

Fifth Class—When the gross sales are three million dollars or more, and less than three million five hundred thousaid dollars, the license shall be three thousand six hundred dollars ($3,600.00).

Sixth Class—When the gross sales are two million five hundred thousand dollars or more, and less than three million dollars, the license shall be three thousand dollars ($3,000.00).

Seventh Class—When the gross sales are two million dollars or more, and less than two million five hundred thousaid dollars, the license shall be two thousand four hundred dollars ($2,400.00).

Eighth Class—When the gross sales are one million five hundred thousand dollars or more, and less than two million dollars, the license shall be one thousand eight hundred dollars ($1,800.00).

Ninth Class—When the gross sales are one million dollars or more, and less than one million five hundred thousand dollars, the license shall be one thousand two hundred dollars ($1,200.00).

Tenth Class—When the gross sales are seven hundred and fifty thousand dollars or more, and less than one million dollars, the license shall be nine hundred dollars ($900.00).

Eleventh Class—When the gross sales are six hundred thousand dollars or more, and less than seven hundred and fifty thousand dollars, the license shall be eight hundred dollars ($800.00).

Twelfth Class—When the gross sales are five hundred thousand dollars or more, and less than hix hundred thousand dollars, the license shall be six hundred and fifty dollars ($650.00).

Thirteenth Class—When the gross sales are four hundred thousand dollars or more, and less than five hundred thousand dollars, the license shall be five hundred dollars ($500.00).

Fourteenth Class—When the gross sales are three hundred thousand dollars or more, and less than four hundred thousand dollars, the license shall be three hundred and sixty dollars ($360.00).

Fifteenth Class—When the gross sales are two hundred and fifty thousand dollars or more, and less than three hundred thousand dollars, the license shall be three hundred dollars ($300.00).

Sixteenth Class—When the gross sales are two hundred thousand dollars or more, and less than two hundred and fifty thousand dollars, the license shall be two hundred and fifty dollars ($250.00).

[fol. 144] Seventeenth Class—When the gross sales are one hundred and fifty thousand dollars or more, and less than two hundred thousand dollars, the license shall be one hundred and eighty dollars ($180.00).

Eighteenth Class—When the gross sales are one hundred thousand dollars or more, and less than one hundred and fifty thousand dollars, the license shall be one hundred and twenty dollars ($120.00).

Nineteenth Class—When the gross sales are seventy-five thousand dollars or more, and less than one hundred thousand dollars, the license shall be ninety dollars ($90.00).

Twentieth Class—When the gross sales are fifty thousand dollars or more, and less than seventy-five thousand dollars, the license shall be sixty dollars ($60.00).

Twenty-first Class—When the gross sales are forty thousand dollars or more, and less than fifty thousand dollars, the license shall be fifty dollars ($50.00).

Twenty-second Class—When the gross sales are thirty thousand dollars or more, and less than forty thousand dollars, the license shall be thirty-five dollars ($35.00).

Twenty-third Class—When the gross sales are twenty-five thousand dollars or more, and less than thirty thousand dollars, the license shall be thirty dollars ($30.00).

Twenty-fourth Class—When the gross sales are twenty thousand dollars or more, and less than twenty-five thousand dollars, the license shall be twenty-five dollars ($25.00).

Twenty-fifth Class—When the gross sales are fifteen thousand dollars or more, and less than twenty thousand dollars, the license shall be twenty dollars ($20.00).

Twenty-sixth Class—When the gross sales are ten thousand dollars or more, and less than fifteen thousand dollars, the license shall be fifteen dollars ($15.00).

Twenty-seventh Class—When the gross sales are five thousand dollars or more, and less than ten thousand dollars, the license shall be ten dollars ($10.00).

Twenty-eighth Class—When the gross sales are less than five thousand dollars, the license shall be five dollars ($5.00).

Provided, that if any distilled, vinous, malt or cereal drinks, ice cream, confections, soda water, soda pop, coca-

cola, cherocola, grapico or other similar soft drinks or beverages or refreshments be sold in connection with, or in the same establishment with, the business of retail merchant, the sale thereof shall be deemed a separate business, and a separate license shall be paid for the pursuit of such business, as may be provided by this Act, or by existing laws not hereby repealed, or by subsequent laws.

Provided further, that farmers or planters having stores on their farms or plantations, and selling or advancing supplies to their employees exclusively, shall not be classed as merchants nor shall they be required to take out a license under this Act.

[fol. 145] EXHIBIT A

Katz & Besthoff Stores in Direct Competition with the Liggett Drug Co., Ltd.

Sales 1934

Liggett Drug Co., Ltd.		Katz & Besthoff, Ltd.	
Sales Not More Than	Address	Sales Not More Than	Address
$110,000	840 Canal	$345,000	841 Canal
85,000	1001 Canal	205,000	732 Canal
65,000	200 St. Charles	85,000	235 Carondelet

[fol. 146] EXHIBIT B

Comparison of Operations

Calendar Year 1934

New Orleans Stores		Katz & Besthoff	Liggett Drug Co. Ltd.
I. Branch Stores With Sales Less Than	$65,000	..	1
" " " " " "	85,000	1	1
" " " " " "	95,000	1	..
" " " " " "	110,000	1	1
" " " " " "	125,000	1	..
" " " " " "	185,000	3	..
" " " " " "	190,000	1	..
" " " " " "	205,000	1	..
" " " " " "	345,000	1	..
II. Total No. of Stores Reported		10	3
With Gross Total Sales of Not More Than (Maximum)		$1,775,000	$280,000
With Gross Total Sales of Not Less Than (Minimum)		1,225,000	216,000

[fol. 147] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF L. O. SCHMIDT—Filed May 28, 1936

(Copy)

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Before me, the undersigned authority, a Notary Public duly commissioned and qualified in and for the aforesaid County and State, this day personally came and appeared L. O. Schmidt, to me personally known, who, being first duly sworn, did depose and say:

My name is L. O. Schmidt. I am Treasurer of Liggett Drug Company, Inc., and am in charge of its financial records. I have investigated the percentage of profits to sales in the various states in which the Liggett Company and its subsidiaries were doing business in 1934. In 1934 there was a net percentage of earnings on sales in the State of Louisiana of .0296 per dollar of value. This percentage was exceeded by the earnings in the States of Mississippi, Alabama and Florida in the southern territory and was very closely followed by the State of Georgia. In seven other states and the District of Columbia the percentage of profits exceeded the percentages of profits earned in the State of Louisiana. In eleven other states in which there were profits in 1934 the percentages of earnings were lower than in the State of Louisiana while in ten other states no profits were earned. A comparison of percentages shows that of twenty-three states and the District of Columbia which showed earnings, Louisiana was twelfth in the percentage of earnings per dollar of sales, ten states and the District of Columbia having higher earnings per sales.

It is my opinion that the same earnings as were realized by the six Liggett stores in Louisiana could and would have been shown had the six stores in Louisiana been operating as independent stores or as a group of six stores operated by a person or company not having stores elsewhere. The volume of business done in the State of Louisiana by these six stores was sufficient to secure the quantity discounts which are given in the drug trade, together with all other advantages that are said to appertain to the chain store business.

It is my experience, over a period of twenty-one years in

the drug business, that the percentage of profits will vary in different cities and states from year to year dependent upon conditions prevailing in the different cities and states, no one city or state being comparable to any other city or state. Many circumstances enter into the matter, such as competitive conditions, including number of competing stores and type of competition, desirability and character of the location, and type of the neighborhood or community in which the store is situated, and the kind and quality of [fol. 148] merchandise generally used and sold in such community or neighborhood; but in my opinion the major factor is the financial and employment conditions existing in each city. The type and character of the business done is also important. For illustration, in some parts of the business such as cigars and cigarettes, the gross profit is extremely small and in stores where these items furnish a large proportion of the business the percentage will be lower than in stores in which the bulk of the business is in other items.

The retail drug business is a specialized business and depends to a large extent on local management. There are no very large drug chains in the United States, there being none with as many as six hundred stores, and there are thousands of single store druggists who and many small chains which operate and have continuously operated very successfully in competition with the larger and largest drug chains. In the drug business such competition is and always has been keen and the number of stores in proportion to the available business is and always has been large. In the final analysis, namely, the matter of net earnings, the results of the operation of independent stores and small chains in the drug business show as favorably as the larger or largest chains.

The State and the cities of Louisiana have a number of varied and different kinds of licenses and taxes, and the taxes and license fees paid by the Liggett Drug Company, Inc. in connection with the drug business in the State and the cities of Louisiana (not including any chain store tax) exceed the average of the taxes paid by it in other states and cities.

(Signed) L. O. Schmidt.

Sworn and subscribed to before me at New York City on the 16th day of July, 1935. (Signed) Rose Watkins Wolfe, Notary Public, Kings County. (Seal.)

[fol. 149] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF J. A. DONALDSON—Filed May 28, 1936

J. A. Donaldson, being first duly sworn on oath deposes and says that he is the Assistant Comptroller of Montgomery Ward & Co., Incorporated, the intervenor herein, and that he has occupied said position since May 15, 1932; that said intervenor has its corporate domicile in the state of Illinois, in which state it was incorporated November 21, 1919; that subject to and by virtue of its charter powers, the laws of the state of Illinois and the Federal laws regulating interstate commerce, intervenor is authorized to and does conduct a general nation-wide mail order business, in connection with which it also operates retail stores; that in each of the forty-five states in which intervenor is authorized to do business it pays franchise, license, sales, property and occupational taxes co-extensive with the jurisdictional limits of such state or political subdivisions and the amount [fol. 150] of property, volume of business, or privileges exercised, therein; that in each of the forty-five states of the Union wherein intervenor is licensed as a foreign corporation the laws of each such state provide a foreign corporation assessment measure based on the proportion of business done or property owned by any such corporation within the given state; that it paid the sum of $4,469.50 for 1934 chain store taxes to twelve states, excluding Louisiana, for the privilege of operating a total of 107 stores therein, an average chain store tax of approximately $42.00 per store; that all of said chain store taxes were based solely upon the number of stores respectively operated in the respective states levying the tax, without regard to the number of stores operated in other states; that for the privilege of doing business as a foreign corporation in the State of Louisiana, intervenor has paid the required corporation Franchise Tax for the current taxable period, based upon the ratio of its property and assets in Louisiana and the volume of business done in Louisiana to its total property and assets wherever situated and total business done everywhere; that it paid $75.00 in chain store taxes to the State of Louisiana in 1934; that it has paid to the State of Louisiana and to the five Louisiana cities in which it has retail stores, occupational license taxes imposed by Act

#15, Acts 1934, totalling $1700.00, which license taxes are fixed and graduated upon gross sales of the said five retail stores operated by it within the State of Louisiana only; that it has paid for the year 1934, $7,204.16 in State, City and Parish ad valorem property taxes.

That on January 31, 1935, this intervenor was operating a total of 489 retail stores and 28 other mercantile establishments, which retail stores and mercantile establishments are more particularly described herein as follows:

I

Retail Stores

(a) 17 department stores located, respectively, at: Albany, New York, Baltimore, Maryland, Chicago, Illinois, Columbus, Ohio, Denver, Colorado, Des Moines, Iowa, Fort Worth, Texas, Jamaica, New York, Kansas City, Missouri, [fol. 151] Nashville, Tennessee, Oakland, California, Oklahoma City, Oklahoma, Portland, Oregon, Saint Paul, Minnesota, San Diego, California, Spokane, Washington, Wichita, Kansas,

which stores are designated as Class "A" stores and carry a complete line of general merchandise; that said stores during the fiscal year ended January 31, 1935, had average sales of $1,271,118.00 per store, an average payroll of $138,094.00 per store, and paid in local taxes, exclusive of income taxes and sales taxes collected from customers, an average of $4,820.00 per store.

(b) 456 retail stores of limited size carrying a limited line of merchandise, designated as Class "B" stores and located in forty-five states which had, during the fiscal year ended January 31, 1935, average sales of $251,287.00 per store, an average payroll of $23,297.00 per store, and paid in local taxes, exclusive of sales taxes collected from customers and income taxes, an average of $1,031.00 per store.

(c) 16 small stores devoted exclusively to the sale of hardware, household appliances, automobile tires and tubes, respectively located in ten states, all of which are designated as Class "C" stores; that said stores during the fiscal year ended January 31, 1935, had average sales of $77,664.00 per store, an average payroll of $7,679.00 per store, and paid an average of $308.00 in local taxes, ex-

clusive of income taxes and sales taxes collected from customers, per store.

II

Other Mercantile Establishments

(a) 9 mail order establishments engaged in warehousing, selling, and shipping a complete line of merchandise to all parts of the United States and foreign countries on orders received from all parts of the United States and foreign countries through the mail, which mail order establishments are respectively located at: Albany, New York, Baltimore, Maryland, Chicago, Illinois, Denver, Colorado, Fort Worth, Texas, Kansas City, Missouri, Oakland, California, Portland, Oregon, Saint Paul, Minnesota;

[fol. 152] that for the fiscal year ended January 31, 1935, the average sales for each of said mail order establishments was $12,083,092.00.

(b) 19 order offices located in Florida, Georgia, Minnesota, New York, and Wisconsin, consisting merely of display rooms where no stocks are carried, although catalogs and samples are displayed, and all sales are made by means of regular catalog orders which are forwarded to the aforesaid mail order establishments for acceptance and direct shipment to the customer.

This affiant further states that during the year ended December 31, 1934, this intervenor operated five stores in the State of Louisiana, located, respectively, at Alexandria, Baton Rouge, Lafayette, Monroe, and Shreveport, all of which stores were a part of the group designated above as Class "B" stores; that the average net sales for said stores during the calendar year 1934 was $184,803.00 per store; that the average payroll during said year was $19,367.00 per store; that the average rent for said year was $10,360.00 per store; that the average net loss sustained by this intervenor during said year for each store was $12,935.20, and no single store showed a profit; that during said year this intervenor operated five stores in the State of Arkansas, also designated as Class "B" stores; that the average net sales of each of said stores during the said year was $166,646.00; that the average payroll during said year was $16,685.00 per store; that the average rent for said year

was $4,932.00 per store; and the average net loss during said year was $2,818.00 per store.

This affiant further states that the intervenor has executed leases for said five stores operated by it in Louisiana, the terms of which expire, respectively, on December 31, 1938, June 30, 1939, April 25, 1940, March 31, 1941, and January 13, 1945; that the fixed rental liability under said unexpired terms is approximately $200,000.00; that the abandonment of said stores by the intervenor would mean a substantial capital loss to this intervenor.

This affiant further states that said five Louisiana stores are operated as branches of and agents for the said mail order establishment operated by this intervenor at Fort Worth, Texas, in the following manner: that catalogs de- [fol. 153] scribing the merchandise available at said Fort Worth mail order establishment are displayed at said retail stores and that customers of said stores may select whatever merchandise they wish from said catalog by filling out a catalog order at the retail store, which is transferred by the retail store for acceptance and shipment to said mail order establishment, which, in turn, if it accepts the order, ships the merchandise direct to said customers; that the total mail orders received by and transferred from said Louisiana stores to said Fort Worth mail order establishment during the fiscal year ended January 31, 1935, was the sum of $35,233.62; that said stores also act as agents for said Fort Worth mail order establishment in accepting orders for merchandise not carried in stock at said stores, which orders are transferred to said mail order establishment and shipped direct to the customer, either from Fort Worth, Texas, or from the factory making such merchandise, all of which are located outside the State of Louisiana, depending upon whether the merchandise is carried in stock at Fort Worth or only at the factory; that the intervenor's records do not accurately show the amount of such direct shipments, but that the amount of said shipments during said fiscal year ended January 31, 1935, has been estimated at about four per cent of the total sales of said Louisiana retail stores; that the aforesaid factory or stock orders, and the aforesaid transferred catalog orders constitute transactions in interstate commerce and that said transactions constituted about nine per cent of the total business done by said stores.

Affiant further states that approximately sixty-seven per cent of all sales made by the intervenor's aforesaid mail order establishments require the shipment of merchandise from the state in which the mail order house is located to a customer residing outside of that state, and said mail order houses are mercantile establishments mainly engaged in interstate commerce.

Affiant further states that all of the sales made by the intervenor's aforesaid order offices in Georgia and Wisconsin require the shipment of merchandise from, and acceptance of orders by a mail order house outside said states, and [fol. 154] that said order offices are mercantile establishments exclusively engaged in interstate commerce.

J. A. Donaldson.

Subscribed and sworn to before me this 18 day of July, 1935. T. R. Hoday, Notary Public. (Seal.)

[fol. 155] In United States District Court

[Title omitted]

Affidavit of C. B. Fullerton—Filed May 28, 1936

C. B. Fullerton, being first duly sworn on oath, deposes and says that he is General Attorney for the intervenor Montgomery Ward & Co., and that he has acted as its General Attorney continuously for the past eight years; that during said period he has had direct personal charge of all matters wherein any dispute between the intervenor and the Federal Trade Commission was involved; that during all of said period the Federal Trade Commission has undertaken to control the trade practices of the intervenor by virtue of its interstate commerce operations; that the mail order and retail store business of the intervenor has been and is so intermingled that it has been impossible to adopt one set of trade practices for its retail stores and another set of trade practices for its mail order business; that all items displayed and advertised in its mail order catalogs are sold through its retail stores, that said catalogs are displayed in said stores, and that the local advertising of said stores is based thereon; that all of the intervenor's merchandise is purchased by one central buying organiza-

tion whether sold through its retail stores or its mail order houses; that said merchandise is stored in and distributed from warehouses which ship direct both to retail stores and mail order customers; that by virtue of the foregoing facts all of the trade practices of the intervenor have been subjected to regulation by the Federal Trade Commission notwithstanding that chain stores and individual store operators, engaged in direct competition with the retail stores operated by plaintiff, are not subject to such regulation because such competitors are not engaged in interstate commerce; that an example of the effect of such regulations [fol. 156] is the action taken by the Federal Trade Commission in 1932 against the intervenor, and other mail order companies similarly situated with respect to the advertisement of silk merchandise containing a large percentage of tetra chloride of tin, technically described as "weighted" silk; that the Trade Commission found, and this affiant knows of his own knowledge that such silk is universally advertised and sold by retail stores throughout the United States under the simple designation "silk" or "all silk" without any reference whatsoever to the aforesaid weighting; that notwithstanding said practice of retail merchants engaged in intra-state commerce, the Federal Trade Commission filed complaint against the intervenor, and other mail order concerns similarly engaged in interstate commerce, based upon advertising matter contained in its Fall and Winter Catalogs of 1932 and 1933, and upon purchases of the fabrics in question made at its retail store at Albany, New York; that as a result of said complaint the intervenor has been forced by the Federal Trade Commission to advertise in its catalog silk containing a certain percentage of tetra chloride of tin as "weighted" silk notwithstanding the fact that competing chain store and individual merchants engaged in intra-state commerce, and therefore not subject to the jurisdiction of the Federal Trade Commission, are able to continue to advertise and sell identical merchandise as simply "silk" or "all silk" merchandise. Affiant further states that the Federal Trade Commission has forced the intervenor to comply with Commercial Standard CS39-32 issued by the Bureau of Standards of the United States Department of Commerce in regard to advertising wool and part-wool blankets, which Commercial Standard is, in words and figures, as follows:

"1. Purpose.—The purpose is to provide standard methods of labeling wool and part-wool blankets in order to protect the interests of the manufacturer, distributor and user, by means of an open understanding on the significance of label wording and tolerances on the amount of wool contained in a finished blanket.

2. Application.—The percentages and tolerances given herein are applicable to finished blankets as delivered by the manufacturers.

Standard Percentages of Wool Content

3. No finished blanket containing less than 5 per cent wool shall carry the word "wool" in any form.

4. Blankets labeled with the word "Wool" in any form and containing:

(a) Between 5 and 25 per cent wool shall be labeled 'Part wool not less than 5 per cent wool.'

(b) More than 25 per cent wool shall be labeled with the guaranteed (minimum) wool content in percentage.

(c) Above 98 per cent wool shall be labeled 'All wool.'

5. The wool percentage above refers to the fibers employed and means the percentage of wool in the entire blanket and not in the filling alone. (This statement to appear in the commercial standard but not on the labels or tickets used in connection with the wool and part wool blankets.)

[fol. 157] Type Size

6. In advertising matter applying to part wool blankets, the words 'Not less than — % wool' shall be shown in the same size and style, and as legible and distinct type as the words 'Part Wool' and shall follow immediately after the words 'Part Wool,' or be set up within three consecutive lines in the following order and relative position;

Part Wool
Blankets
Not less than —% Wool"

that these practices are only two of a large number of trade practices involving many different types of merchandise

which the intervenor has been compelled to adopt by the regulations of the Federal Trade Commission, not only with respect to its interstate business but with respect to the operation of its retail stores, due to the commingling and close relationship of said business heretofore set forth; that in regulating said practices the Federal Trade Commission has frequently based its complaints upon merchandise advertised locally by and purchased from this intervenor's retail stores, and has consistently refused to treat the retail store operations of the intervenor separately from its mail order operations in regulating its trade practices.

Affiant further states that page 208 of the intervenor's current Spring and Summer Catalog, hereto attached, marked Exhibit "A", and expressly made a part hereof, illustrates the manner in which the intervenor complies with said "Weighted" silk regulation, and page 285 of its current Fall and Winter Catalog, hereto attached, marked Exhibit "B", and expressly made a part hereof, illustrates its compliance with said "wool content" regulation; that said articles are handled by intervenor's retail stores under the same restrictive descriptions contained in said catalog pages and are referred to herein as typical of many other like articles upon all of which the regulations of the Federal Trade Commission have been imposed.

(Signed) C. B. Fullerton.

Subscribed and sworn to before me this 21 day of May, 1935. (Signed) T. R. Hoday, Notary Public.

[fol. 158] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF WALTER C. SCHULZ—Filed May 28, 1936

UNITED STATES OF AMERICA
State of New York,
County of New York, ss:

Before me, the undersigned authority, a notary public duly commissioned and qualified in and for the County and State aforesaid, this day personally came and appeared Walter C. Schulz, who being by me duly sworn, deposes and says:

My name is Walter C. Schulz. I am over the age of twenty-one years and reside at New York City, N. Y. I

am Secretary of J. J. Newberry Co., a Delaware Corporation, having been connected with that Company for thirteen years. I am also Secretary of J. J. Newberry Co., a Texas Corporation.

J. J. Newberry Co., a Delaware Corporation, in 1934 had 330 stores, none of which were located in Louisiana and said corporation was not engaged in doing business in Louisiana.

Said J. J. Newberry Co., a Delaware Corporation, has three subsidiary corporations, one incorporated in Virginia, a second incorporated in California and a third incorporated in Texas. Neither the Virginia Corporation nor the California Corporation have any stores located in Louisiana and are not engaged in doing business in Louisiana.

J. J. Newberry Co., a Texas Corporation, has a total of fifteen stores, of which one is located in Louisiana.

J. J. Newberry Co., a Texas Corporation, began to do business in Louisiana in 1933. The first complete year of operation was 1934. The following figures show the result of operations of its two stores in Louisiana for 1934:

Gross income	$195,422.51
Total expenses	192,633.89
	$2,788.62

Capital invested in Louisiana $34,217.00.

The result of all operations of J. J. Newberry Co. and its three subsidiaries for the year 1934 as disclosed by its [fol. 159] annual report was as follows:

Total sales	$41,054,217.93
Total expenses, including cost of merchandise sold, interest, depreciation, amortization, etc	38,209,018.22
Net earnings before Federal income taxes	$2,845,199.71

Total capital invested $24,765,731.00.

A comparison of these results show- that the operations of the Louisiana stores were much less profitable than the operations of the Company and its subsidiaries as a whole. If these total earnings of $2,845,199.71 are divided among 431 total stores, the result in figures would be $6,601.00 p

store whereas the two Louisiana stores made $2,788.62, or about $1,394.00 each. The percentage of net earnings to sales for the corporation and its subsidiaries was somewhat under 7% while in Louisiana the percentage of net earnings to gross income was less than 1½%. The percentage of net earnings to capital invested in Louisiana was somewhat over 8% while the percentage of net income to total assets of the corporation and its subsidiaries was over 11%.

(Sgd.) Walter C. Schulz.

Sworn to and subscribed before me at New York City, N. Y., this 15th day of November, 1935. (Sgd.) H. Willgohs, Notary Public. (Seal.)

[fol. 160] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF A. J. RASKOPF—Filed May 28, 1936

UNITED STATES OF AMERICA,
State of New York,
County of New York, ss.:

A. J. Raskopf, being duly sworn, deposes and says:

My name is A. J. Raskopf. I am over twenty-one years of age, and reside at 68 Manor Road, Lynbrook, New York; I am Secretary of J. C. Penney Company, and have been connected with that company for more than fifteen years.

J. C. Penney Company is engaged in the business of selling general merchandise at retail. On January 1, 1935, it owned and operated 1,474 stores in 48 states. In Louisiana the company operated 8 stores, one each at Shreveport, Monroe, Lafayette, Baton Rouge, Alexandria, Lake Charles, Bogalusa and Hammond.

There is attached hereto as Exhibit A, a statement showing (a) as to the entire corporation, and (b) as to the stores in Louisiana, for five years past, the figures as to gross earnings, expenses, net earnings, percentage of earnings on sales, values invested and percentage of earnings of values. The figures of net earnings of the entire system are after deducting Federal taxes. The figures shown in this exhibit for Louisiana earnings are after deducting all direct expenses incurred in the operation of J. C. Penney Company stores in Louisiana, including the Louisiana stores' proportionate part of the expenses of operation of the company's

general offices and buying department, calculated in proportion to sales, and after deduction for Federal taxes.

For the year 1932 Louisiana operations showed a loss. A [fol. 161] study of the figures indicates that the percentage of earnings to sales of the company in Louisiana are less than its percentage of earnings to sales for the entire company. The figures also show that the percentage of earnings to values was less in Louisiana than for the entire company in the years 1930, 1931 and 1932, and were more in the years 1933 and 1934. Percentage of earnings to values is an inaccurate factor in determining any difference as between localities. It depends upon such factors as the following:

In some states the company owns some of its stores and in other states it leases all of its stores. In some states the company has large stores located in urban districts with a proportionately high investment in inventory, fixtures and improvements, and in other states, such as Louisiana for example, it has comparatively small stores with a smaller per store investment in inventory, fixtures and improvements. The consequence is that the percentage of earnings to values differs materially according to the character of the investment in the particular state or district and the proportion of earnings to values in Louisiana is not at all affected by store operations outside the state of Louisiana.

With respect to percentage of earnings on sales, there is a considerable variation as between different parts of the country, depending upon the particular conditions surrounding the operations of the J. C. Penney Company in that particular part of the country. The Louisiana units are not comparable, for example, with units operated in other sections of the country or in other states.

[fol. 162] There is annexed hereto as Exhibit B, a statement comparing the results of the company, showing by nine districts, the gross figures for the year ending December 31, 1934, as to investment, net earnings, gross revenue, expenses, percentage of net earnings to values and percentage of net earnings to gross income in each district. There is also shown the number of stores operated in each district. An examination of this exhibit will show the differences in result from district to district. Louisiana is included in the West South Central District in this statement. It will be seen that the percentage of net earnings to gross revenues varies from 8.426% down to 6.7416%, and that the per-

centage of net earnings to capital invested varies from 45.7675% down to 31.7546%, a considerable variation, depending definitely upon the particular conditions of the particular locality.

A further illustration of this point is shown in the variation in the figures between two different states. In North Dakota, with gross revenues of $4,649,156, the company had net earnings of $422,258 in 1934, or a percentage of profit to gross revenue of 9.08%. In New Jersey, with gross revenue $687,034, the company had net earnings of $25,565, or a percentage of profit to gross revenue of 3.72%.

Stores in any given state may show better or worse results than average and differ widely from stores in other particular states, considering the disparity in wealth, population, purchasing power, and the like, among the different states in which the company does business.

There would be no basis in fact for any assumption that operations of a store in any given state furnish any indica-
[fol. 163] tion of the probable operations in any other state.

In 1934 tax payments other than state taxes to the state of Louisiana for 1934 were as follows:

Franchise taxes	$570.92
State, City and Parish license taxes	2,711.00
State, City and Parish ad valorem taxes	6,346.92
	$9,628.84

(Sgd.) A. J. Raskopf.

Sworn to and subscribed before me this 23rd day of August, 1935. (Sgd.) Geo. J. Widener, Notary Public. (Seal.)

[fol. 164]

EXHIBIT A

J. C. Penney Company

Re: Louisiana Chain Store Tax Litigation

Entire Corporation

	1930	1931	1932	1933	1934
Gross	192,943,765.42	173,705,094.52	155,271,981.19	178,773,965.05	212,053,361.46
Expenses	40,537,885.06	36,694,886.25	32,440,796.54	39,823,465.20	43,568,827.62
*Earnings	8,290,622.16	8,913,565.38	5,082,672.17	14,235,638.10	16,147,315.39
Earnings on Sales	04.30%	05.13%	03.27%	07.96%	07.61%
Values	69,125,566.30	71,422,740.52	64,752,378.52	69,385,657.19	77,907,241.07
Earnings on Values	11.99%	12.48%	07.85%	20.52%	20.73%

State of Louisiana

Gross	1,387,534.87	1,208,861.88	1,028,340.53	1,406,838.56	1,895,470.00
Expenses	290,280.67	254,512.63	221,973.57	286,789.49	363,771.83
**Earnings	21,060.66	28,841.82	8,559.44†	90,693.12	133,397.34
Earnings on Sales	01.52%	02.39%	.....	06.44%	07.04%
Values	290,967.78	272,750.29	228,784.69	340,518.24	347,976.36
Earnings on Values	07.24%	10.57%	.....	26.62%	38.34%

* After Federal tax deduction.

** After Federal tax deduction and pro rata share of company administration expense.

[† Red in copy.]

[fol. 165]

EXHIBIT B

Region	No. of stores	Capital invested (mdse. & fixtures)	Net earnings	Percentage of net earnings to capital invested	Gross revenues	Percentage of net earnings to gross revenues	Total expenses
New England (6 States)	28	$648,561.	$205,948.	31.7546%	$2,868,558.	07.1795%	$578,741.
Middle Atlantic (3 States)	86	2,383,729.	841,085.	35.2844%	11,905,719.	07.0645%	2,313,150.
East North Central (5 States)	238	7,012,972.	3,178,224.	45.3192%	40,821,640.	07.7856%	7,870,664.
West North Central (7 States)	372	8,446,733.	3,451,824.	40.8658%	45,359.791.	07.6099%	8,546,137.
South Atlantic (8 States)	90	2,565,199.	970,883.	37.8482%	13,062,582.	07.4325%	2,569,296.
East South Central (4 States)	62	1,533,226.	623,715.	40.6799%	8,338,579.	07.4799%	1,537,803.
West South Central (4 States)	170	5,643,823.	1,794,356.	31.7933%	26,616,159.	06.7416%	5,092,434.
Mountain (8 States)	215	5,043,542.	2,308,309.	45.7675%	27,392,905.	08.4267%	5,015,520.
Pacific (3 States)	226	6,967,441.	2,502,951.	35.9235%	35,687,440.	07.0135%	7,108,836.
Totals	1487	40,245,226.	15,877,295.		212,053,373.		40,632,581.

(Merchandise and Fixtures figures shown above are amounts on hand as at December 31, 1934.)

[fol. 166] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF E. P. TOLLEY—Filed May 28, 1936

UNITED STATES OF AMERICA,
State of Illinois,
County of Cook:

E. P. Tolley being duly sworn, deposes and says as follows:

My name is E. P. Tolley. I reside in the City of Chicago and am 33 years of age. I am Assistant Controller of The Scott-Burr Stores Corporation, which is a Delaware corporation engaged in the business of operating 5¢ to $1 retail variety stores. As of January 1, 1935, this Company owned and operated 135 stores in twenty-six States, of which three stores were situated in Louisiana, one each in Alexandria, Baton Rouge and New Orleans. There is attached marked List 1 a list showing the number of stores operated by the corporation in each State. The conditions and circumstances surrounding the operation of the corporation's stores vary widely from State to State, according to the conditions prevailing in the respective States. The sales of the stores in Louisiana are substantially less than the sales of stores outside of Louisiana. In the year 1934 all stores operated by the corporation made a total profit of $59,752 while each Louisiana store was operated at a loss as follows:

New Orleans Store lost	$915.00
Baton Rouge Store lost	7,053.00
Alexandria Store lost	2,858.00

In the year 1933 the present corporation was not in existence, but Scott Stores, Inc., one of the predecessor companies of the present corporation, during 1933 operated stores in Louisiana now operated by The Scott-Burr Stores Corporation, and during that year suffered a total loss on the three Louisiana stores of $12,000, while on all of its operations it suffered a total loss of $15,000, so that the loss from the Louisiana stores in 1933 accounted for three-fourths of the loss suffered by the corporation, although the Louisiana stores operated were less than 3% of the total number of stores operated. The operation of the corporation's stores in Louisiana adds nothing to the value of the corporation's stores outside Louisiana. Operations in

Louisiana are more difficult and less profitable than the average operations outside Louisiana.

Although our Louisiana stores are of absolutely no benefit to the corporation as yet, we are reluctant to incur the very substantial loss in merchandise and fixtures which would result if we closed our Louisiana units. We are, therefore, continuing our operations in Louisiana in the hope that we may ultimately be able to show a profit for the stores there.

During the year 1934 the corporation had investments in the State of Louisiana of approximately $60,000 and paid license taxes aggregating $685.00 and ad valorem property taxes aggregating $3,935.46.

(Sgd.) E. P. Tolley.

Sworn to and subscribed before me this 13th day of July, 1935. (Sgd.) Gary Carlton, Notary Public. My Commission expires March 4, 1939. (Seal.)

[fol. 167] EXHIBIT

List 1

The Scott-Burr Stores Corporation

Stores Operated In Various States

Alabama	2
Arkansas	11
Georgia	1
Illinois	21
Indiana	4
Iowa	8
Kansas	5
Kentucky	3
Louisiana	3
Michigan	3
Minnesota	9
Mississippi	2
Missouri	12
Nebraska	3
New Jersey	1
New York	1
North Carolina	1
North Dakota	1
Ohio	7
Oklahoma	14

EXHIBIT—Continued

South Dakota	2
South Carolina	2
Tennessee	1
Texas	14
West Virginia	1
Wisconsin	3
Total Number of Scott & Burr Stores	135

[fol. 168] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF E. P. TOLLEY—Filed May 28, 1936

UNITED STATES OF AMERICA,
State of Illinois,
County of Cook:

Before me, the undersigned authority, a Notary Public duly commissioned and qualified in and for the aforesaid County and State, this day personally came and appeared:

E. P. Tolley, to me personally known, who being first duly sworn, did depose and say:

I am Assistant Controller of The Scott-Burr Stores Corporation and on May 8, 1935, I made an affidavit regarding the operations of that Company to be filed in evidence in the suit pending in the Federal Court in the Eastern District of Louisiana involving the validity of the Louisiana Chain Store Tax Law of 1934.

I have read the comments of Mr. J. D. Huck, Jr. in his affidavit of January 4, 1936, in which he states that The Scott-Burr Stores Corporation has charged an unreasonable proportion of general office overhead or general expense against Louisiana sales. This statement is without foundation. We have only one method of distributing all overhead expense which cannot be applied directly to any one individual store. Our method is this—We ascertain the exact percentage of general overhead expense to total sales everywhere. This percentage is then used on the sales of each individual store so that without exception all stores, both within and without the State of Louisiana, have the same percentage of general office overhead expense.

Mr. Huck's affidavit refers to an item of $50,007.63 as representing the figure of general expenses charged to all our stores. We do not know where Mr. Huck obtained this figure. We know of no chain store system which can operate 135 stores to pay all of its executives, department heads, merchandise buyers, superintendents, office force, etc. and also pay all interest charges and general office expense and rent for any sum like $50,000.00. Our general expenses in 1934, including all of these items, amounted to $409,439.00. This was 6.075% on our total sales of $6,740,-186.35, and the charge of $11,664.34 which we made to Louisiana stores was exactly 6.075% of our Louisiana sales which amounted to $192,007.53.

The figures as to earnings shown in my original affidavit differ from the figures shown in our income tax returns because the income tax returns included for amortization, deferred charges, etc. which I excluded from consideration [fol. 169] in my affidavit in stating operating results. The following is a summary reconciliation of the figures in our income tax returns with operating figures:

Net loss—State of Louisiana	-($20,907.02
" " Without Louisiana	-(200,357.13)
(1) 1934 Expense carried on Books as deferred charges	40,938.01
(a) Amort.—Lease hold Improvements	204,445.95
(b) Depreciation—Fixtures & Equipment	38,828.58
(c) Plate Glass Breakage	533.74
5. Total of Lines 1 to 4, inclusive	$63,482.13
6. Total from Line 14	879.83
7. Net Profit for year, as shown by books, before any adjustments are made therein	$62,602.30

From this figure are to be deducted losses of other subsidiaries of Butler Bros. (of which Scott-Burr Stores Corporation is a subsidiary) as follows:

Leasing associates	$90.00	
Scott Stores, Inc.	881.00	
L. C. Burr & Co.	1,879.00	
		2,850.00
which leaves a net profit for the system of		$59,752.30

which is the figure set out in my original affidavit. In that affidavit, I also excluded amortization, depreciation, etc. from our Louisiana figures as shown in income tax returns.

The following is a reconciliation of our income tax figures and the figures set out in my affidavit for the operations of Louisiana stores:

Louisiana loss as per affidavit	$10,826.00
Amortization	7,240.00
Additional Depreciation	1,053.00
Cost of Amending Lease	717.00
Manager Bonus Adjustment	83.00
General Expense Adjustment	988.00
	$20,907.00

As can be seen from the foregoing, in my original affidavit I used only the operating figures for the Louisiana stores as well as the stores in the entire system and the Louisiana stores were in fact charged only with the proper proportion of general expense based upon sales just like every other store.

E. P. Tolley.

Sworn to and subscribed before me at Chicago, Ill., this 20 day of February, 1936. (Signed) William E. Mann, Notary Public. My Commission Expires July 2, 1939. (Seal.)

[fol. 170] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF C. L. SCHENK—Filed May 28, 1936

UNITED STATES OF AMERICA,
State of Illinois,
County of Cook:

C. L. Schenk being first duly sworn, deposes and says as follows:

I am forty-five years of age and reside in Chicago, Ill. I am connected with Sears, Roebuck and Co., a New York corporation, and have been connected with that corporation for thirty years. My present position is that of Assistant Secretary, and my duties in that position require me

to be familiar with the conditions of operation of the Company.

At the close of its fiscal year on January 29, 1935, Sears, Roebuck and Co. was operating at various points in the United States a total of 436 stores, classified as follows:

Mail Order	10
"A" Stores	69
"B 1-a" Stores	18
"B 1" Stores	53
"B 2" Stores	178
"B 3" Stores	46
"C" Stores	54
Sub Mail Order Offices	2
Agencies	6
	436

Our mail order stores carry almost every conceivable form of merchandise. Our "A" stores carry a full line of merchandise that is customarily found in many large department stores. Our mail order sub offices carry no merchandise but merely take orders to be shipped by our mail order offices. Our agencies carry hard line merchandise and work on consignment basis. "B 1-a" stores carry the lines of merchandise shown on the attached sheet marked list No. 1. "B 1" stores carry the merchandise listed on the attached list No. 2. Our "B 2" stores carry merchandise listed on the attached list No. 3. Our "B 3" stores carry merchandise listed on the attached list No. 4, and our "C" stores carry merchandise listed on the attached list No. 5. These stores were located in forty-three States and the District of Columbia, as shown on the attached list No. 6.

The 436 stores which we operate altogether vary widely in character. 10 of them are mail order stores engaged en- [fol. 171] tirely in making shipments of goods on orders received by mail, and their operations are almost entirely in interstate commerce. 69 of our 436 stores are classified as "A" stores and conduct business as large department stores. All the others are small stores, the sales in many of them being confined almost entirely to tires, automobile accessories and hardware. A further illustration of the wide variation in the character and extent of the operation

of these stores is shown by the following statement of their average sales and profits during the fiscal year ending January 29, 1935.

	Number of units	Average sales per store	Average profit per store	Percent of profit to sales
Mail Order Stores	10	11,887,080	859,700	7.23
"A" Stores	69	1,614,334	77,290	4.79
"B" Stores	295	262,409	15,526	5.92
"C" Stores	54	76,123	6,148	8.08

We operated in Louisiana during the fiscal year ending January 29, 1935 four stores as follows:

In New Orleans	"A" store.
In Shreveport	"A" store.
In Baton Rouge	"B 1" store.
In Alexandria	"B 2" store.

The following is a statement of the total sales and profits or losses of our Louisiana stores for our fiscal years ending in 1932 to 1935 inclusive, losses being indicated by figures in parentheses:

Sales

	1932	1933	1934	1935
Alexandria	108,950	113,816	132,680	167,419
Baton Rouge	.....	.....	.....	68,691
New Orleans	3,140,968	2,260,389	2,148,212	2,667,588
Shreveport	1,004,352	786,866	765,869	931,369
Total	4,254,270	3,161,071	3,046,761	3,835,067
Average	1,418,090	1,053,357	1,015,587	958,767

Profits or Losses

	1932	1933	1934	1935
Alexandria	(6,112) loss	(12,194) loss	1,199	9,469
Baton Rouge	.....	.....	.....	(2,359) loss
New Orleans	(157,002) loss	(275,650) loss	(138,412) loss	(42,444) loss
Shreveport	(73,385) loss	(78,551) loss	(36,834) loss	618
Total	($236,499) loss	(366,395) loss	(174,047) loss	(34,716) loss
Average	(78,833) loss	(122,133) loss	(58,016) loss	(8,679) loss
Percentage of Loss to Sales	5.56	11.60	5.71	0.91

[fol. 172] The result of operations in Louisiana is relatively much worse than the result of operations in other States. Our operations as a whole showed a profit during the fiscal year ending January 29, 1935, in every State in which we operate except Louisiana, Mississippi, North Dakota and Oklahoma. The maximum percentage of profit to sales was in the District of Columbia, where it was 12.86. In Louisiana we lost .091% on our sales. The average percentage of profit to sales all over the country was 6.39%.

There was a wide difference in the variation from State to State depending on the class of units which we operate in each State and the conditions in each State. Conditions as to sales and profits vary greatly in all classes of stores according to the section of the country in which they are located. Conditions are less favorable to profitable merchandising operations in Louisiana, which is predominantly rural in character, and a large portion of the population of which is negro, but we hope our operations in Louisiana will ultimately show a profit, even if less than in other States.

The attached list marked No. 7 is a schedule showing the taxes paid by us in Louisiana during the fiscal year ending January 29, 1935. Our capital invested in Louisiana at the end of that year was $1,571,882.97.

Further deponent sayeth not.

(Signed) C. L. Schenk, Assistant Secretary.

Sworn to and subscribed before me this 11th day of May, 1935. (Signed) Margaret T. Pointer, Notary Public. (Seal.)

[fol. 173] EXHIBIT 5 TO AFFIDAVIT

List No. 1

"B 1a" Stores

Divisions Carried

1. Furniture.
6. Sporting Goods.
9. Hardware.
11. Kitchenware.
15. Shoes.
19. Linen.
22. Stoves.
26. Refrigerators, Sewing & Washing Machines.
28. Auto Accessories.
30. Paints & Oils.
32. Farm Implements.
33. Mens Furnishing.
37. Rugs and Linoleum.
38. Lingerie.
41. Men's work clothing.
42. Plumbing and Heating.

45. Men's dress clothing.
49. Toys.
53. Wall Paper.
57. Radios.
75. Ladies Hosiery.
90. Oil and Batteries.
95. Tires and Tubes.

[fol. 174]

List No. 2

"B 1" Stores

Divisions Carried

1. Furniture.
6. Sporting goods.
9. Hardware.
11. Kitchenware.
15. Shoes.
19. Linens.
22. Stoves.
26. Refrigerators, Sewing & Washing Machines.
28. Auto Accessories.
30. Paints and oils.
32. Farm implements.
33. Men's furnishings.
37. Rugs and linoleum.
38. Lingerie.
41. Men's work clothing.
42. Plumbing and heating.
45. Men's dress clothing.
49. Toys.
57. Radios.
90. Oil and Batteries.
95. Tires and Tubes.

[fol. 175]

List No. 3

"B 2" Stores

Divisions Carried

1. Furniture.
6. Sporting Goods.
9. Hardware.
11. Kitchenware.

15. Shoes.
22. Stoves.
26. Refrigerators, Sewing & Washing Machines.
28. Auto accessories.
30. Paints and Oils.
32. Farm Implements.
33. Men's Furnishings.
37. Rugs and Linoleum.
41. Men's work clothing.
42. Plumbing and Heating.
49. Toys.
53. Wall Paper.
57. Radio.
90. Oil and Batteries.
95. Tires and Tubes.

[fol. 176]

List No. 4

"B 3" Stores

Divisions Carried

6. Sporting Goods.
9. Hardware.
11. Kitchenware.
22. Stoves.
26. Refrigerators, Sewing & Washing Machines.
28. Auto Accessories.
30. Paints & Oils.
41. Men's work clothing.
49. Toys.
57. Radios.
90. Oil and Batteries.
95. Tires and Tubes.

[fol. 177]

List No. 5

"C" Stores

Divisions Carried

6. Sporting Goods.
9. Hardware.
11. Kitchen Utensils, Enamelware.
20. Electrical Goods.
28. Automobile Accessories.

30. Paints and Oils.
57. Radios.
95. Tires and Tubes.

[fol. 178]

List No. 6

1935

Louisiana Chain Store Tax

	"A"	"B"	"C"	M. O.	Agencies & sub mail order offices	Total
Alabama		5				5
Arizona		2				2
Arkansas		2				2
California	8	9	2	1		20
Colorado	1	1				2
Connecticut		11				11
Delaware		2				2
District of Columbia	1		2			3
Florida	2	5				7
Georgia	1	6		1		8
Illinois	6	21	14	1		42
Indiana	3	11			4	18
Iowa	1	8				9
Kansas		4				4
Kentucky	1	4	1			6
Louisiana	2	2				4
Maine		2				2
Maryland		1				1
Massachusetts	2	20	5	1		28
Michigan	5	11	4			20
Minnesota	2	2	1	1		6
Mississippi		1				1
Missouri	3	2	2	1		8
Nebraska	1	2				3
Nevada		1				1
New Hampshire		3				3
New Jersey	4	14	7			25
New York	4	24	10		1	39
North Carolina		7				7
North Dakota	1					1
Ohio	4	17	2		2	25
Oklahoma	3	4				7
Oregon	1	1				2
Pennsylvania	3	32	1	1	1	38
Rhode Island		5				5
South Carolina		3				3
South Dakota		2				2
Tennessee	1	4		1		6
Texas	3	13	3	1		20
Utah	1	2				3
Virginia		5				5
Washington	3	7		1		11
West Virginia		4				4
Wisconsin	2	13				15
	69	295	54	10	8	436

[fol. 179] List No. 7

Taxes Paid in Louisiana During Fiscal Year Ending January 29, 1935

Franchise Taxes			2,074.90
License Taxes—State			3,683.30
" " —Municipal:			
Alexandria		60.00	
New Orleans		1,952.30	
Shreveport		800.00	
			2,812.30
Other Taxes:			
State & Parish Real	18,824.43		
City Real	35,322.43		
		54,146.86	
State & Parish Pers	6,469.61		
City Personal	8,204.40		
		14,674.01	
			68,820.87
Total Taxes			$77,341.37

[fol. 180] In United States District Court

Affidavit of C. L. Schenk—Filed May 28, 1936

United States of America,
State of Illinois,
County of Cook:

Before me, the undersigned authority, a Notary Public duly commissioned and qualified in and for the aforesaid County and State, this day personally came and appeared: C. L. Schenk, who being first duly sworn, did depose and say:

I am Assistant Secretary of Sears, Roebuck and Company and am the same individual who has heretofore made an affidavit dated May 11, 1935, to be filed in the litigation pending in Louisiana attacking the validity of the Louisiana Chain Store Tax of 1934. I am also the same individual who made the affidavit to the income tax returns filed in the State of Louisiana for 1934 by Sears, Roebuck and Company.

I have seen a copy of the affidavit made by Mr. James D. Huck, Jr., dated January 4, 1936 in which Mr. Huck claims that either the sales and profits reported in my affidavit of May 11, 1935 or those reported in the State income tax returns which I filed are incorrect. There is no basis for Mr. Huck's charge.

The sales shown on the Income tax return are the sales for Sears, Roebuck & Company, a New York Corporation, whereas the sales listed in our affidavit cover the sales of all our retail units—regardless of whether they belong to the New York Corporation or to the other corporations wholly owned by Sears, Roebuck and Company of New York. There are a number of subsidiaries of Sears, Roebuck and Company of New York, which own stores. The sales for these stores are listed in the affidavit, but are not listed in the Income tax return of Sears, Roebuck and Company of New York.

The variation in the profits is accounted for in the same manner. The profits of Sears, Roebuck and Company of New York (which is the company licensed to do business in Louisiana), does not include the results of all the stores. Income reported on income tax returns is not the same as operating income. Adjustments are necessary for reserves, depreciation, deferred profits on installment accounts, etc. The sum of the results of all the stores is never precisely the same as the income reported for Federal income tax purposes.

In Mr. Huck's analysis of our figures, he deducts the following items from our book profit to determine the percentage of profit to sales:

[fol. 181]

7. Interest on Loans, Notes, Mortgages, etc.	$3,973,792.91
8. Rents	3,001,137.08
11. Dividends of Stock of Corporations	254,826.42
12. Other Income	1,484,933.28
Total	$8,714,689.69

The reason given by Mr. Huck for the deduction of these items from our profit per books, is that this income does not arise as a true result of our retail store operations.

Item 7—Interest on Loans, Notes, Mortgages, etc.—$3,973,792.91, is almost totally an inter-company item. This is the amount of interest charged to the retail stores by the Parent company for the investment that the Parent company has in the retail stores. It necessarily follows, inasmuch as this interest is an inter-company item, it appears as income of the Parent Organization and appears as an expense of the retail stores. The Parent company

charges the stores and takes the interest in as income. The stores pick up the same amount as an expense to the individual stores.

If a further examination is made of the Income tax return, there will be found an interest expense item (No. 17, Louisiana Income Tax Return) of $3,874,835.95. This practically offsets the item taken in as income, referred to by Mr. Huck. The adjustment referred to by Mr. Huck is not necessary or permissible.

Item 8—Rents is also an inter-company item. In each case where our stores are located in buildings owned by Sears, Roebuck and Company, a predetermined rent is charged for the use of the store. The offset against this item is Item 15 of the Federal Income Tax Return which is designated as Rent on Business Property in the amount of $7,954,159.72. This rental income is also an inter-company item appearing as an income of the Parent Organization, and appearing as an expense of the retail stores. This Item 8 is very similar to Item 7. There is actually no income to Sears, Roebuck and Company on this item. Sears does not receive any net income from rent. It does not rent buildings to the public. This item should not be deducted in determining the profit of Sears, Roebuck and Company from its retail store operations. It is offset in Item 15 on the Income tax return.

Item 11—Dividends of Stock of Corporations. It is true that this item of income does not arise from the operations of our retail stores. However this item of income [fol. 182] is incidental to the operations of our retail stores because if we did not conduct a retail store business, we would not have this stock—the dividend of which was reported as dividend income.

These dividends are from companies in which we own a portion of the stock and have long term contracts for merchandise—quantities of it. Therefore these dividends very closely approach operating income.

Item 12—Other Income. Practically the entire amount of this income arises through rental from concessions. This item very specifically is the result of our retail store operations. If we did not operate retail stores, we would not collect rentals from concessions which lease space in our stores. Therefore this is operating income.

Therefore, Mr. Huck's contention, that the amount of

$8,714,689.69 should be deducted from the net profit prior to the determination of the percentage to sales, is erroneous.

The information above set out will show that the percentage of profits to sales for our entire system was correctly stated in my original affidavit at 6.39%.

(Sgd.) C. L. Schenk

Sworn to and subscribed before me, at Chicago, Ill., this 21st day of February, 1936. (Sgd.) Margaret T. Pointer, Notary Public. (Seal.)

[fol. 183] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF WILLIAM H. SCHIELD—Filed May 28, 1936

UNITED STATES OF AMERICA,
State of Missouri,
City of St. Louis:

William H. Schield, being first duly sworn, deposes and says:

My name is William H. Schield. I am thirty-eight years of age. I reside at 4434 Westminster Place, St. Louis, Mo. I am Vice-President of Wohl Shoe Company, and have been connected with that Company for six years.

Wohl Shoe Company is a corporation organized under the laws of the State of Missouri. It is engaged chiefly in the business of operating shoe departments in department stores owned and operated by others. It operates such departments in department stores at six points in the State of Louisiana as follows:

Davis', 1001 Canal Street, New Orleans
Emporium, Inc., 629 Canal Street, New Orleans
The Vogue, 1117 Canal Street, New Orleans
Dalton's, Third and Florida Streets, Baton Rouge
Palais Royal, Inc., 600 Milan Street, Shreveport
Sterlings, Texas and McNeil Streets, Shreveport.

Outside Louisiana the Company operates 203 similar departments and 23 stores in thirty-six States and the District of Columbia. The operations of the Wohl Shoe Company are carried on in stores owned and operated by others and are subject to the supervision of the owners of the stores

in which they are conducted. Except in twelve States (not including Louisiana) where the Company operates stores in its own name, the Wohl Shoe Company has no separate establishment or store of its own and has no separate identity. All sales are made in the name of the department store, which assumes all credit risk, and all advertising is done in the name of the department store. The following is a statement of gross sales, expenses, earnings, earnings on sales, total investments and earnings on values for the entire operations of Wohl Shoe Company and for its operations in Louisiana for the years ending December 31, 1932 to December 31, 1934. Figures marked with an "x" are red-ink figures showing losses.

Entire Corporation

	1932	1933	1934
Gross Sales	6,588,808.66	8,291,117.72	11,126,242.19
Expenses	6,262,195.86	7,892,509.66	10,574,687.03
Earnings	326,612.80	398,608.06	551,555.16
Earnings on Sales	.0496	.0481	.0490
Values (Total Assets)	1,598,145.68	1,946,184.80	2,469,551.32
Earnings on Values	.2044	.2047	.2233

[fol. 184]

State of Louisiana

	1932	1933	1934
Gross Sales	125,107.82	149,250.38	336,045.18
Expenses	127,818.37	149,524.52	330,281.59
Earnings	2,710.55x	274.14x	5,763.59
Earnings on Sales	.0217x	.0018x	.0172
Values (Total Assets)	3,470.66	12,522.47	16,241.88
Earnings on Values	.7810x	.0219x	.0355

There is annexed hereto marked "Exhibit A" a statement showing the operation of Wohl Shoe Company for the years 1933 and 1934 in each one of the States in which it operated in that year. This statement shows gross merchandise profit, operating expense, net merchandise profit, general administrative expense, net income, number of departments operating, percentage of net merchandise profit and average income per department, and illustrates the wide variations in the character of the operations of the Company from State to State, which are affected by location, economic conditions, local taste, local management, local competition and a variety of other circumstances. Operations from State to State are not comparable and afford no basis for standardization or classification. In one State there may be an advantageous location of a particular unit and a specially desirable local connection or specially efficient local management or poor competition or

successful or improved economic conditions, while one or more or all of these factors may be absent in another State. Within the boundaries of a State there is a tendency for these conditions to exist with some degree of uniformity, but that is not so when the State boundaries are passed. In Louisiana Wohl Shoe Company operates to no advantage over locally owned shoe stores which have an equal number of stores in Louisiana, many of which have sales substantially greater than those of Wohl Shoe Company and operate at a profit as compared with the loss of Wohl Shoe Company. Shoe departments operated by Wohl Shoe Company in Louisiana enjoy no advantage over shoe departments situated at the same points in the State in economic or efficiency of operation. Department stores at those points, which operate their own shoe departments are, in many instances, able to do so with much larger volume than Wohl Shoe Company can command and with less expense, and can purchase from manufacturers on a quantity basis which will permit them to show larger profits in their shoe departments than Wohl Shoe Company is able to show. [fol. 185] The investment of Wohl Shoe Company in the State of Louisiana in 1934 was approximately $16,000. In that year it paid taxes to the State of Louisiana excluding income taxes, aggregating $918.

(Signed) William H. Schield.

Sworn to and subscribed before me at St. Louis, Mo. this 11th day of May, 1935. (Signed) Richard H. Knight, Notary Public. My commission expires January 26, 1937. (Seal.)

EXHIBIT "A"

Shoe Departments' Statement of Income and Expense

Wohl Shoe Company—St. Louis, Mo.

As of December 31, 1933

	(Direct) Gross merchandise profit	(Direct) Operating expense	Chain store tax paid (included in operating exp.)	(Direct) Net merchandise profit	(Direct) Adm. exp. home office prorated	(Direct) Net income from retail depts.	Number of depts. operating	% of net merchandise profit	Average net income per department
Alabama	26,913.97	23,473.82	22.50	3,440.15	2,552.23	887.92	3	3.9	296.00
Arizona	15,163.72	13,078.74		2,084.98	1,332.15	752.83	3	4.6	251.00
Arkansas	15,677.02	15,624.31		52.71	1,610.85	1,558.14–	2	.095	779.00–
California	154,618.70	138,898.31		15,720.39	13,561.21	2,159.18	17	3.4	127.00
Colorado	1,224.29	5,371.54		4,147.25–	205.39	4,352.64–	1	5.9–	4,352.00–
Connecticut	(No Departments Operating 1933)								
District of Columbia	15,234.90	16,115.61		880.71–	1,534.23	2,414.94–	5	1.2–	482.00–
Florida	(No Departments Operating 1933)								
Georgia	41,615.68	38,944.55		2,671.13	3,964.01	1,292.88–	6	1.97	216.00–
Idaho	(No Departments Operating 1933)								
Illinois	161,42[illegible].61	151,854.94		9,579.67	15,164.56	5,584.89–	21	1.8	265.00–
Indiana	123,194.13	103,969.09	164.50	19,225.04	11,254.76	7,970.30	15	4.99	531.00
Iowa	67,396.68	57,914.52		9,482.16	6,126.70	3,355.46	10	4.5	336.00
Kansas	93,180.10	78,937.97		14,242.13	8,648.35	5,593.78	9	4.8	622.00
Kentucky	62,083.64	54,336.50		7,747.14	6,007.81	1,739.33	7	3.7	248.00
Louisiana	46,043.00	41,953.22	36.96	4,089.78	4,363.92	274.14–	7	2.7	39.00–
Massachusetts	(No Departments Operating 1933)								
Michigan	141,406.14	129,160.77	570.00	12,245.37	13,113.79	868.42–	15	2.7	58.00–
Minnesota	81,546.99	77,654.71	20.00	3,892.28	7,418.46	3,526.18–	6	1.5	588.00–
Mississippi	11,752.34	8,644.76		3,107.58	1,077.48	2,030.10	1	8.4	2,030.00
Missouri	241,250.94	212,578.93		28,672.01	22,959.64	5,712.37	18	3.6	312.00
Nebraska	61,517.86	58,319.44		3,198.42	5,748.58	2,550.16–	7	1.0	364.00–
New Jersey	(No Departments Operating 1933)								
New York	17,425.24	17,134.85		290.39	1,751.27	1,460.88–	3	.48	487.00–
North Carolina	29,349.49	28,469.31		880.18	2,942.36	2,062.18–	5	.9	412.00–

EXHIBIT "A"—Continued

Shoe Departments' Statement of Income and Expense

Wohl Shoe Company—St. Louis, Mo.

As of December 31, 1933

	(Direct) Gross merchandise profit	(Direct) Operating expense	Chain store tax paid (included in operating exp.)	(Direct) Net merchandise profit	(Direct) Adm. exp. home office prorated	(Direct) Net income from retail depts.	Number of depts. operating	% of net merchandise profit	Average net income per department
North Dakota	28,894.47	22,673.29	.....	6,221.18	2,507.61	3,713.57	4	7.3	928.00
Ohio	152,610.02	131,496.84	.....	21,113.18	14,180.85	6,932.33	10	4.4	693.00
Oklahoma	126,288.48	116,235.93	.....	10,052.55	12,115.41	2,062.86–	11	2.4	188.00–
Oregon	30,306.55	37,630.71	.....	7,324.16–	2,926.47	10,250.63–	2	7.3–	5,125.00–
Pennsylvania	10,934.48	10,857.14	.....	77.34	1,136.35	1,059.01–	2	.2	530.00–
South Carolina	41,873.70	41,377.77	30.00	495.93	4,088.11	3,592.18–	5	.4	718.00–
South Dakota	28,385.28	24,707.64	.....	3,677.64	2,496.11	1,181.53	4	4.3	295.00
Tennessee	130,516.78	114,542.58	.....	15,974.20	12,002.27	3,971.93	16	3.9	247.00
Texas	116,264.47	111,471.08	.....	4,793.39	11,063.61	6,270.22–	14	1.3	.....
Utah	50,991.72	44,532.29	.....	6,459.43	4,642.92	1,816.51	4	4.1	454.00
Virginia	31,360.92	32,979.61	.....	1,618.69–	3,054.88	4,673.57–	6	1.5–	779.00–
Washington	53,459.07	50,026.58	.....	3,432.49	4,868.68	1,436.19–	5	2.1	287.00–
West Virginia	12,964.12	9,865.74	2.50	3,098.38	1,176.10	1,922.28	1	7.7	1,922.00
Wisconsin	30,658.08	25,626.75	.....	5,031.34	2,794.32	2,237.02	5	5.3	447.00
(9 states omitted—no dept's.)									
Totals	2,253,537.59	2,046,459.84	846.46	207,077.75	210,391.42	3,313.67–	*250	2.9	13.00–

– Denotes red figures.

* Total departments in operation during 1933. Actual number of units operating January 1, 1934—206.

(Here follows 1 paster, folio 187.)

[fol. 187]

Shoe Department's Statement Income and Expenses

Wohl Shoe Company-. Louis, Mo.

As of Decembe, 1934

	(Direct) Gross merchandise profit	(Direct) Operating expense	Chain store tax paid (included in operating ex.)	(Direct) Net merchandise profit	(Direct) Adm. exp. ome office prorated	(Direct) Federal income tax	(Direct) Net income from retail depts.	Number of departments operating	% of net mdse. prof.	Average net income per department
Alabama	39,040 87	32,139 81	22 50	6,901 06	4,277 15	287 97	2,335 94	4	5 1	584 00
Arizona	14,731 81	12,330 44		2,401 37	1,656 75	111 55	633 07	2	5 1	317 00
Arkansas	20,790 32	17,256 09		3,534 23	2,351 48	158 32	1,024 43	3	5 3	341 00
California	198,679 72	172,095 42		26,584 30	1,153 93	1,424 26	4,006 11	16	4 4	250 00
Colorado	1,315 93	1,527 52		211 59	94 32	6 35	312 26-	1	7 9-	312 00-
Connecticut	1,120 75	1,706 78		586 03	162 19	10 92	759 14-	1	12 8-	759 00-
District of Columbia	18,584 37	16,405 75		2,178 62	2,071 02	139 44	31 84-	2	3 7	16 00-
Florida	1,420 45	4,523 61		3,103 16	417 49	28 11	3,548 76-	3	26 8-	1,183 00-
Georgia	84,470 48	68,919 61		15,550 87	9,393 59	632 46	5,524 82	7	5 9	746 00
Idaho	5,498 68	5,400 17	11 00	98 51	639 00	43 02	583 51-	2	5	292 00-
Illinois	260,187 76	220,278 61		39,909 15	8,068 91	1,889 84	9,950 40	24	5 0	414 00
Indiana	143,838 69	123,751 69	168 50	20,087 00	5,587 13	1,049 46	3,450 41	14	4 6	246 00
Iowa	98,706 59	80,174 79		18,531 80	0,583 93	712 60	7,235 27	9	6 2	804 00
Kansas	115,874 21	93,178 15		22,696 06	2,497 46	841 44	9,357 16	7	6 4	1,337 00
Kentucky	96,887 66	79,888 24		16,999 42	0,779 77	725 79	5,493 86	8	5 6	687 00
Louisiana	109,520 17	91,076 26	100 00	18,443 91	1,880 43	799 89	5,763 59	7	5 5	822 00
Massachusetts	1,235 69	3,262 77		2,027 08	252 24	16 98	2,296 30-	1	28 4-	2,296 00-
Michigan	205,887 28	165,936 92	570 00	39,950 36	1,861 57	1,471 91	16,616 88	17	6 5	977 00
Minnesota	111,641 40	96,118 73	20 00	15,522 67	2,214 49	822 38	2,485 80	6	4 5	414 00
Mississippi	11,538 46	8,504 00		3,034 46	0,273 41	85 74	1,675 31	2	8 4	838 00
Missouri	321,159 97	259,600 63		61,559 34	4,335 54	2,311 76	24,912 04	15	6 3	1,660 00
Nebraska	62,780 81	54,287 33		8,493 48	5,615 71	445 43	1,432 34	6	4 5	238 00
New Jersey	2,605 59	3,239 45		633 86	359 03	24 17	1,017 06-	1	6 3-	1,017 00-
New York	33,238 01	36,523 65		3,285 64	1,016 96	270 46	7,573 06-	5	2 9-	1,514 00-
North Carolina	48,229 38	40,842 16		7,387 25	3,342 67	359 71	1,684 84	5	4 9	337 00
North Dakota	34,370 16	26,081 34		8,288 83	3,344 51	225 18	4,719 13	4	8 8	1,179 00
Ohio	178,928 43	145,410 71		33,517 72	0,191 67	1,292 39	13,033 66	10	6 2	1,303 00
Oklahoma	174,252 99	143,297 31		30,955 68	9,602 55	1,252 48	11,100 65	10	5 9	1,110 00
Oregon	52,642 05	51,224 73		1,417 32	5,701 27	383 86	4,667 81-	3	9	1,555 00-
Pennsylvania	32,058 89	27,389 58		4,669 31	3,587 76	241 55	840 00	4	4 6	210 00
South Carolina	65,909 80	56,621 74	75 00	9,288 06	7,513 17	505 85	1,269 04	5	4 4	254 00
South Dakota	34,089 01	27,554 12		6,534 89	3,548 47	238 89	2,747 53	3	6 5	915 00
Tennessee	147,687 67	120,451 72		27,235 95	5,213 69	1,091 64	9,930 62	12	5 9	829 00
Texas	216,671 44	188,634 62		28,036 82	3,412 48	1,576 32	3,048 02	16	4 2	191 00
Utah	69,264 96	56,469 00		12,795 96	7,386 04	497 29	4,912 63	5	6 1	982 00
Virginia	52,352 44	44,805 82		7,546 62	3,692 56	383 27	1,470 79	5	4 7	294 00
Washington	58,969 61	49,680 26		9,289 35	3,289 59	423 47	2,576 29	5	5 2	515 00
West Virginia	28,418 68	21,522 61	8 00	6,896 07	2,978 55	200 54	3,716 98	2	8 2	1,858 00
Wisconsin	35,570 79	28,022 77		7,548 02	3,719 46	250 43	3,578 13	4	7 1	895 00
(9 States omitted—no dept's) Federal Income Tax Capital Stock Tax										
Totals	3,190,171 97	2,676,134 91	975 00	514,037 06	0,067 94	23,233 12	145,736 00	256*	5 3	$565 00

- Denotes red figures.

* Represents total number of departments operating any time during 1934. Actual depts or units in operation Jan. 1, 1935 was 232 operating in 203 stores.

[fol. 188] I

Supplemental Schedule of Comparative Sales for Retail Depts.

Wohl Shoe Company—St. Louis, Mo.

For the years ending 12/31/34 and 12/31/33

State	Net Sales 1934	1933
Alabama	120,981.80	87,288.85
Arizona	46,861.86	45,560.83
Arkansas	66,512.66	55,092.63
California	598,354.14	463,807.28
Colorado	2,667.33	7,024.49
Connecticut	4,587.73	.....
Dist. of Columbia	58,579.90	52,472.38
Florida	11,809.07	.....
Georgia	265,704.57	135,573.28
Idaho	18,074.68	.....
Illinois	793,950.08	518,643.15
Indiana	440,893.64	384,923.43
Iowa	299,374.30	209,539.28
Kansas	353,499.80	295,782.18
Kentucky	304,913.74	205,473.32
Louisiana	336,045.18	149,250.38
Massachusetts	7,134.72	.....
Michigan	618,370.74	448,501.99
Minnesota	345,495.84	253,718.87
Mississippi	36,019.22	36,850.87
Missouri	971,203.49	785,236.24
Nebraska	187,130.21	196,607.22
New Jersey	10,155.46	.....
New York	113,622.62	59,895.30
North Carolina	151,121.31	100,638.45
North Dakota	94,601.97	85,762.89
Ohio	542,850.64	484,999.47
Oklahoma	526,186.91	414,359.35
Oregon	161,264.61	100,088.10
Pennsylvania	101,480.14	38,860.95
South Carolina	212,515.55	139,817.36
South Dakota	100,359.69	85,366.03
Tennessee	458,614.95	410,489.76
Texas	662,236.59	378,386.74
Utah	208,919.71	158,782.42
Virginia	161,018.42	104,480.02
Washington	177,905.69	166,513.71
West Virginia	84,250.62	40,223.83
Wisconsin	105,207.72	95,568.44
Various states omitted—No depts.		
	9,760,477.31	7,195,579.49

[fol. 189] II

Schedule of Comparison of Earnings in Louisiana With Entire Corporation Wohl Shoe Company

For the years ending Dec. 31, 1932 to Dec. 31, 1934

Entire Corporation

	1932	1933	1934
Gross Sales	6,588,808.66	8,291,117.72	11,126,242.19
Expenses	6,262,195.86	7,892,509.66	10,574,687.03
Earnings	326,612.80	398,608.06	551,555.16
Earnings on Sales	.0496	.0481	.0490
Values (Total Assets)	1,598,145.68	1,947,184.80	2,469,551.32
Earnings on Values	.2044	.2047	.2233

State of Louisiana

Gross Sales	125,107.82	149,250.38	336,045.18
Expenses	127,818.37	149,524.52	330,281.59
Earnings	2,710.55–	274.14–	5,763.59
Earnings on Sales	.0217–	.0018–	.0172
Values (Total Assets)	3,470.66	42,522.47	16,241.88
Earnings on Values	.7810–	.0219–	.0355

[– Red in copy]

[fol. 190] In United States District Court

Affidavit of J. T. Leftwich—Filed May 28, 1936

United States of America,
State of New York,
County of New York:

J. T. Leftwich being duly sworn, deposes and says:

My name is J. T. Leftwich. I am forty-six years of age and reside at 87 Bellevue Avenue, Montclair, N. J. I am Assistant Secretary-Treasurer of F. W. Woolworth Co. and have been connected with that Company for twenty-two years.

F. W. Woolworth Co. is a corporation organized under the laws of New York. Its business is that of selling general merchandise at retail at prices up to 20¢ per article. On January 1, 1935 the Company operated a total of 2,634 stores, of which 1,811 were situated in forty-seven States in the United States, 137 were situated in Canada, eight in Cuba, eighty-one in Germany and 597 in Great Britain. Fourteen of these stores were situated in Louisiana, seven being in New Orleans and one each in Shreveport, Baton Rouge, Alexandria, Monroe, Lafayette, Hammond and Bogalusa. The number and location of stores that the Cor-

poration had in opeartion in each of the past five years is as follows:

	1930	1931	1932	1933	1934
Total United States of America	1,746	1,767	1,795	1,804	1,811
Louisiana	10	11	12	13	14
Canada	134	135	135	135	137
Cuba	8	8	8	8	8
Germany	60	69	77	81	81
Great Britain	428	458	486	529	597

There is attached hereto as "Exhibit A" a statement showing (a) as to the entire corporation and (b) as to the stores in Louisiana, for five years past, the figures as to gross earnings, expenses, net earnings, percentage of earnings on sales, values invested and percentage of earnings on values. These figures exclude income from British and German subsidiaries which operate stores in Germany and Great Britain. The combined net income from these subsidiaries for five years past was as follows:

1930	$9,242,020.53
1931	9,147,877.47
1932	6,038,981.43
1933	7,802,179.36
1934	10,386,793.59

[fol. 191] The figures shown in "Exhibit A" of net earnings of the entire System are after deducting Federal income taxes. The figures shown in this exhibit for Louisiana earnings are after deducting a pro rata of overhead and general expenses calculated in proportion to sales, but before any deduction for Federal income taxes. If Federal income taxes applicable to Louisiana earnings were deducted from the earnings of the Louisiana stores, the following earnings would be shown:

	Earnings	Earnings on Gross
1930	$74,064.02	.0402
1931	49,583.18	.0275
1932	12,817.31 x loss	.0083 x loss
1933	41,385.72	.0240
1934	71,592.14	.0354

For the year 1932 the Louisiana operations showed a loss. A study of the figures indicates that the earnings of the Company in Louisiana are substantially less than its earnings outside Louisiana. The Company's records indeed indicate that in the year 1934 the Louisiana net income per

store was about half the average of the income per store of the stores in the St. Louis District, which comprises 189 stores in eleven different states including Louisiana. This is due to the more unfavorable conditions of operation in Louisiana. In view of the size of the Company's operations, it is not feasible to furnish detailed figures of operations from State to State. The Company's results vary widely from State to State and country to country, being affected by such considerations as purchasing power, habits of population, differences in consumer demand, expense of operation, quality of management, competition and various other considerations. Conditions of operation in Louisiana are not at all affected by operations outside the State, and obviously not by operations in foreign countries. Indeed a comparison of the Louisiana figures with the figures for the rest of the District in which Louisiana is situated, comprising a total of eleven states in the same section of the country, shows, as above stated, that the Louisiana earnings per store are about one-half of the earnings of the stores in that section of the country. This shows the variation in results from State to State, even among adjoining States, and the variations are much more marked and much sharper as between sections of the country and as between this country and foreign countries.

In 1933 F. W. Woolworth Co. paid in taxes to the State of Louisiana a total of $27,284.96. In 1934 the total taxes paid by F. W. Woolworth Co. in that State were $27,284.96. [fol. 192] These figures do not include chain store taxes under the Louisiana statute of 1934.

In its operations in the State of Louisiana the F. W. Woolworth Co. is in competition with locally owned and operated stores and chains, including, for example, the stores operated by Morgan & Lindsey, a chain selling goods at prices up to $1. This concern, according to information obtained by affiant, operates a total of forty-five stores in Louisiana and adjoining States, of which twenty-seven are located in Louisiana, and it has an aggregate capital investment of three-quarters of a million dollars. Under the Louisiana chain store Act of 1932, similar to that existing in other States, taxes paid by this concern in Louisiana were the same as those paid by F. W. Woolworth Co. Under the Louisiana Act of 1934, the taxes payable by Morgan & Lindsey for twenty-seven stores in the State of Louisiana were reduced from an aggregate of $905 (the amount pay-

able under the 1932 Act) to not more than an aggregate of $540, while the taxes payable by F. W. Woolworth Co. for operating in Louisiana fourteen stores, or about half the number operated by Morgan & Lindsey, were increased from $305 (payable under the 1932 Act) to $7,700 under the 1934 Act. F. W. Woolworth Co. is required to pay the State of Louisiana $650 per store on each of fourteen stores, while Morgan & Lindsey, operating twenty-seven stores in Louisiana, would pay under the 1934 Louisiana statute a maximum of $20 per store. There is no privilege given to F. W. Woolworth Co. from the State of Louisiana sufficiently different in quality or value from the privilege given to Morgan & Lindsey to justify such a differential in tax amounting to more than $500 per store per year, or more than $40 per month per store for substantially the same kind of store. If each municipality in Louisiana in which the F. W. Woolworth Co. operates should levy a tax similar to that imposed by the State under the Act of 1934, the tax against each Woolworth store in Louisiana would amount to $1,100, while the tax against each Morgan & Lindsey store would amount to a maximum of $40. The tax demanded by the State of Louisiana under the 1934 Act is not only sought to be calculated by reference to the stores that the Woolworth Co. operates outside Louisiana and foreign countries but is calculated upon the basis of putting all of the Louisiana stores in the highest brackets of tax classification.

(Signed) J. T. Leftwich.

Sworn to and subscribed before me at New York, N. Y., this 27 day of May, 1935. (Signed) Paul Costello, Notary Public. (Seal.)

[fol. 193]

EXHIBIT A

F. W. Woolworth Company

Re Louisiana Chain Store Tax Litigation

Entire Corporation

	1930	1931	1932	1933	1934
Gross	$292059834.04	285439541.77	259707721.57	251236965.83	271495349.92
Expenses	266572302.07	263339873.19	234257287.78	230798238.28	249816611.06
Earnings	25487531.97	22099668.58	16450433.79	20438727.55	21678738.86
Earnings on Sales	.0873	.0774	.0656	.0814	.0798
Values	141022759.17	145797991.81	136679963.89	145604403.76	148516279.82
Earnings on Values	.1807	.1516	.1204	14.04	.1460

State of Louisiana

	1930	1931	1932	1933	1934
Gross	$1842006.69	1800123.46	1546050.50	1725239.83	2021878.30
Expenses	1757843.03	1743778.94	1558867.81	1677256.39	1945630.86
Earnings	84163.66	56344.52	12817.31x	47983.44	76247.44
Earnings on Sales	.0457	.0313	.0083x	.0278	.0328
Values	526896.77	540819.38	519739.88	581724.85	617891.30
Earnings on Values	.1597	.1042	.0247x	.0825	.1234

x—Denotes red ink figures.

[fol. 194] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF J. T. LEFTWICH—Filed May 27, 1935

UNITED STATES OF AMERICA,
State of New York,
County of New York:

J. T. Leftwich being duly sworn, deposes and says:

My name is J. T. Leftwich. I am Assistant Secretary-Treasurer of F. W. Woolworth Company, and have heretofore made an affidavit under date of May 27, 1935 with respect to the operations of F. W. Woolworth Company to be filed in the suit pending in the United States District Court for the Eastern District of Louisiana with respect to the Louisiana chain store tax law of 1934.

I have read a copy of the comments upon my affidavit made by the accountant for the State, Mr. James D. Huck, Jr., in an affidavit executed by him under date of January 4, 1936, and in connection with those comments, state the following further facts.

The State's accountant claims that in a comparison of the income of F. W. Woolworth Company in Louisiana with its income outside of Louisiana, Interest, Rents and Capital Gains should be excluded. This contention is in my opinion correct except for an item of Interest amounting to $1,860,330, which is an intercompany Interest item charged as an Expense item to the subsidiary as well as an Income item to the parent Company. If this item is eliminated from Income in the comparison, it must also be eliminated as an Expense. Therefore, for the purpose of comparison, if our consolidated earnings are reduced by the elimination of $5,871,094.46 as contended by the State's accountant, the item of Expense aggregating $249,816,611.06, which is referred to in the affidavit, must be reduced by $1,860,330.00. The result would be to show the profits of the system as a whole at $17,667,974.10 instead of $15,807,644.10 as contended by the State's accountant in his affidavit. These profits would amount to 6.5% on sales instead of 5.82% as contended by the State's accountant, and would compare with a Louisiana profit of 3.77% on sales. Even after this adjustment, the Louisiana net income per store remains very much less than the average earnings per store of the system as a whole.

The State's accountant makes a comment in connection with the charge against the Louisiana stores' operation for executive overhead of the main office amounting to $28,937.70, that this figures 1.43% of the sales made in Louisiana and that there is not sufficient information available to ascertain whether or not this amount is reasonable. The charges against the Louisiana stores for these items are shown by our income tax returns to represent the following:

[fol. 195] Salaries	$23,287.50
Corporation expenses	5,650.20
Total	$28,937.70

The total amount of such expenses allocated to all stores is $3,882,383.50, which, it will be noted, is 1.43% of total sales of $271,495,349.92, and the expenses of $28,937.70 charged to Louisiana stores is the same percentage of their sales. It will be noted further that Louisiana sales were in 1934 .7447% of total sales, and that $28,937.70 is .7453% of the total amount to be allocated.

(Sgd.) J. T. Leftwich.

Sworn to and subscribed before me this 10 day of February, 1936. (Sgd.) Paul Costello, Notary Public. (Seal.)

[fol. 196] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF J. T. LEFTWICH—Filed May 28, 1935

UNITED STATES OF AMERICA,
State of New York,
County of New York:

Before me, the undersigned authority, a Notary Public, duly commissioned and qualified to act in and for the aforesaid County and State, this day personally came and appeared:

J. T. Leftwich, to me personally known, who being first duly sworn, did depose and say:

Since making my affidavit dated February 10, 1936, I have been requested to make a statement with respect to the comment in Mr. Huck's affidavit of January 4, 1936, regarding the practice of chain store operators in invoicing stores

in which he suggests that the branches are charged a price which will allow a profit to the main office.

It is not the practice of F. W. Woolworth Co. to invoice branch stores for merchandise shipped to them at an arbitrary price. The stores, wherever located, pay the same prices for their goods. The merchandise is listed to the store by the buyer; it is ordered by the store direct from the manufacturer; it is shipped directly to the store by the manufacturer; and it is charged to the store by the Company at the prices paid by the Company to the manufacturer. The stores pay the charges for shipment of all merchandise to them. These charges are added to the cost of the merchandise in each particular store. Therefore, the only difference between the cost of merchandise to one store as compared to another is the distance the merchandise travels from the point of shipment. By this method, the Company is in a position to determine the profits accurately in each individual store and in each state.

(Signed) J. T. Leftwich.

Sworn to an subscribed before me at New York, New York, this 16 day of March, 1936. (Signed) Le Roy G. Hunold, Notary Public, New York County, New York County Clerk's No. 506. New York County Register's No. 6-H-646. Commission expires March 30, 1936.

[fol. 197] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF PAUL H. NYSTROM—Filed May 28, 1936

UNITED STATES OF AMERICA,
State of New York,
County of New York:

Before me, the undersigned authority, a Notary Public, duly commissioned and qualified in and for the aforesaid County and State, this day personally came and appeared:

Paul H. Nystrom, to me personally known, who being first duly sworn, did depose and say:

I reside in New York and am fifty-eight years of age. I am a graduate of the University of Wisconsin and also hold the degree of Master and Doctor of Philosophy from the same institution. I am a professor of marketing in the

School of Business of Columbia University. The School of Business is a college of equal rank with the colleges of law, medicine, engineering, and others making up the University. As a professor of marketing it is my duty to conduct courses in marketing including general marketing, retail merchandizing and studies in consumer demand, as well as to guide advanced ~~or~~ graduate students in their research in problems of marketing. In addition to my educational work I also devote considerable time to market analysis for and consultation with private businesses. My clients include manufacturers, wholesalers and retailers.

My experience began at the age of fifteen as an employee in middle western country general merchandise stores for four years. This was followed by positions as teacher and principal successively in country, village and city schools for a period of six years. During these years I was constantly employed out of school hours and during vacation periods in commercial activities. From 1909 to 1914 I was a member of the Faculty of the University of Wisconsin, rising, in that period to the grade of Assistant Professor of Political Economy. During three successive years, 1906-[fol. 198] 1908, while in educational work in Wisconsin, I also served as Special Investigator for the Wisconsin State Tax Commission. During the school year 1914-1915 I served as Associate Professor of Economics in the University of Minnesota. I resigned my position there in the spring of 1915 and took up work as assistant to the president on marketing problems in the U. S. Rubber Company, New York City. In June, 1917, I was appointed director of research and later sales manager of the International Magazine Company, publishers of Cosmopolitan, Good Housekeeping, and four other well-known magazines of national circulation. From January, 1921, down to June, 1927, I was managing director of the Retail Research Association, a co-operative group of eighteen independent department stores with headquarters in New York. On leaving the Retail Research Association in 1927 I was appointed to the Faculty of the School of Business of Columbia University and took up my present activities in education and business consulting.

I am the author of several books including the "Economics of Retailing", first published in 1915, but revised twice since, a book which has served as a standard text in educational

institutions and as a practical guide to men in business since it was first issued. Among the other books of which I am the author are the "Economic Principles of Consumption", "Economics of Fashion", "Retail Selling and Store Management", and a pamphlet published by the Chamber of Commerce of the United States on "Chain Stores". I am also the author of the articles on marketing appearing in the Twelfth, Thirteenth and Fourteenth editions of the Encyclopedia Britannica. Besides the foregoing I have also written many articles on marketing for periodicals and have lectured frequently before trade and business groups on the same subject.

[fol. 199] With the establishment of the NRA I was called to Washington to act in an advisory capacity to the NRA executives on the development of the Retail Code. On the suggestions of the officers of the NRA I was assigned to work with one of the retail trade associations, the Limited Price Variety Stores Association in the preparation of the Code. After the Code was signed I was retained by this association as its President and as its representative on the NRCA. I served as Vice-Chairman of the Code Authority up to May 1, 1935 and thereafter as its Acting Chairman.

One of the marked characteristics of the retail trade as compared with manufacturing and other industries is that, with certain exceptions, costs of operation do not decline and net profits do not rise as sales increase. In stores having but very small sales the expenses of operation may run higher than the average, but when a retail store has reached a certain optimum volume of business, which varies according to the lines handled and services rendered, a minimum cost of doing business is reached. As rough approximations, and for purposes of illustration, it may be stated that these optimum sales volumes range from about $30,000.00 to $60,000.00 per year in grocery stores, upward to higher amounts in drug stores, hardware stores and furniture stores. After the point of optimum sales volume has been reached, increases in sales beyond that point are usually accompanied by increases in expenses of operation.

Accurate as well as representative compilations of retail store expense figures have been made over a number of years by the Harvard Bureau of Business Research on such lines as groceries, shoes, department stores, specialty

stores, variety stores, stationery and office supplies. Similar but less comprehensive studies have come from other [fol. 200] universities including Iowa, Nebraska, Oregon, Minnesota and Ohio. Various trade associations such as the National Retail Hardware Dealers Association, the National Retail Furniture Dealers Association, the National Retail Druggists Association and the National Association of Retail Clothiers and Furnishers have likewise gathered figures from members of their respective trades on expenses of operation in relation to sales.

All the studies referred to above indicate the same conclusion, namely, that after some minimum optimum sales point has been reached, a point at which a necessary sales volume has been secured to make sufficient retail operation possible, the rates of expenses of operation not only tend to parallel increasing sales but to rise in proportion to sales.

There are, of course, exceptions to this rule. Usually, however, an analysis of the exception shows conditions that tend to prove the rule. In many cases these exceptions are due to differences in lines of merchandise handled or services rendered. To illustrate: when a hardware dealer expands his retail sales above, say $50,000.00 a year, in accordance with this rule, he is likely to find his expense rate increasing rather than diminishing. However, if his increase in volume of sales is secured by including new lines of business such as heating and roofing contract work, the sale of agricultural implements, of building materials or the sale of automobiles and trucks, these additions to his volume may result in a decline of expenses of operation. Naturally, this does not change the fact that further increases in the hardware business as such may bring increasing rates of expense.

The reason why expense rates in retailing rise as sales increase as compared with customary declines in costs of [fol. 201] operation as volume increases in manufacturing, is that the typical unit of operation in retailing is the individual sale to an individual customer ranging in averages from 7¢ in variety stores, 26¢ in drug stores, 47¢ in chain grocery stores and on up to $2.00 or more in department stores. Selling, which is the most important activity in store operation, has never been, and probably never can be, reduced to the routine time and labor saving operations of the mass production methods of a factory.

There are, of course, economies in operation in large scale retail institutions such as come from the distribution of general items of overhead expenses, including rent, interest, heat, light, etcetera, over an increasing sales volume, but these savings are usually fully counterbalanced by the increase in expenses due to attracting additional sales volume and in providing the additional supervision and record keeping required to maintain the larger retail concern in efficient operation.

From the standpoint of expenses of operation, then, it is clear that concerns with larger sales volumes do not earn larger net returns and are consequently not better able to pay higher rates of taxes than concerns with lower sales.

Moreover, there is nothing in the published reports of chain store companies, or any other evidence, to indicate that the rates of net profits necessarily increase as sales volumes are increased. Net profits vary widely from concern to concern as well as from trade to trade. Net profits also vary for each concern from year to year, and although there are no published figures to bear out the next statement, it may be safely assumed that net profits vary widely from store to store within the same concern.

I know it has been frequently asserted that the operation of stores by the chain system has a tendency to drive independent retailers and the wholesalers who supply them out [fol. 202] of business, and that this assertion has been sometimes seized upon as a supposed reason for a different treatment of chain store operation from independent operation in the application of taxes. But this reason is not founded on fact. In the competition of various types of business institutions it is inevitable that some should occasionally give way to others. During the period of rapid growth of the chains back in the 1920's there were undoubtedly instances in which independent retailers were forced out of business by their chain store competitors, but there were likewise instances in which chain store units were forced to close up by independents. At the present time independent retailers are holding their own in competition with chains, not only in point of numbers, but also in volume of goods sold.

A comparison of figures presented by the U. S. Census, not only for the country as a whole but also for the State of Louisiana, for the year 1933 with the year 1929, is con-

clusive evidence that chains are not driving independent stores and their wholesalers out of business.

In the U. S. Summary of the Retail Census for 1933, page 3, the figures presented show that the total number of retail stores including all types, declined slightl (1.1%) but the number of retailers (proprietors actively engaged in their stores but not on payrolls) increased 4.2%.

These figures do not specifically segregate independents and chain stores but most chain store managers are on payrolls, hence cannot be included as proprietors. Clearly the increase was among independents. The number of independent retailers throughout the country is not declining. It is actually increasing.

In another publication of the Bureau of the U. S. Census, "Chains and Independents and Other Types of Operations", page 1-a, there are figures showing that there were [fol. 203] 2% fewer independent stores in 1933 than in 1929, while there were 4.3% fewer chain stores in 1933 than in 1929.

In the State of Louisiana the number of independent stores for 1929 according to the U. S. Census of Retail Distribution for Louisiana, No. R 129, page 20, was 20,994, and the number of chain stores was 1,224. In 1933, according to The Census of American Business, Chains and Independents, page 37, the number of independents in Louisiana was 20,014 and the number of chain stores was 1,144. This shows that the number of independents decreased from 20,994 in 1929 to 20,014 in 1933; a decrease of 4.67%. The number of chain stores decreased from 1,224 to 1,144, a decrease of 6.54%. This does not indicate that chain store systems are driving independent retailers out of existence in the State of Louisiana.

It is also of interest to note, in connection with wholesalers who constitute the principal sources of supply of independent retailers, that their number is likewise increasing instead of declining. According to the Census of American Business, 1933, Wholesale Distribution, Vol. VI, page 30, the total number of wholesalers of all kinds, including agents, brokers, manufacturers' sales branches, etc. increased from 4,954 in 1929 to 5,252 in 1933, an increase of 6%. The number of "wholesalers proper", however, under which are included wholesale grocers, wholesale druggists, wholesale hardware and many other lines supplying the

Louisiana Independent retail trade increased during the same period (according to the publication last above referred to at page 139) from 882, to 1,109, an increase of 24.6%. These figures speak for themselves and close all discussion on the question as to whether chain stores are driving independent retailers and their wholesale sources of supply out of existence.

[fol. 204] Early this year the Federal Trade Commission completed a monumental study of chain stores. One of the purposes of this study was to discover if chains were to any extent forcing independents out of existence. If there were any such facts, the Federal Trade Commission would certainly have found them and would have made them an important part of its findings. On the contrary, the reports indicate no such trend.

There are simply no authentic figures of any kind to indicate that there is now any general movement in which independent retailers are being driven out by chain stores. There are other figures on chain store operation which may be misinterpreted as gains over the independent trade. For example, the Census of Distribution reported that total chain store volume in 1933 amounted to 25% of the total retail trade of the country as against only 20% in 1929. Superficially, this seems to indicate that while chain stores may have lost ground to independents in numbers as indicated in a previous paragraph, they may actually be gaining in sales volume.

A close analysis shows that this percentage gain is not an accurate index of actual growth of the chains. Most chain stores deal in staples, necessaries and well advertised goods such as in the grocery, drug, variety and other fields. When the depression following 1929 began, the sales in these goods did not fall off either in chain or independent stores in the same proportion as in novelties, fashion goods, home furnishings and so on. Thus, while total retail sales fell off 49%, chain store sales because of their specialization in staple lines of merchandise fell off only 35.8%, consequently their proportion of total retail sales in 1933 was higher than in 1929.

Chain stores are relatively weak in both numbers and sales [fol. 205] in novelties, fashion goods and home furnishings. Consequently, when business improves, and when the sales of these goods again rise to normal levels, the proportions of

sales in staples such as handled by the chains will fall. It is almost inevitable that the relative proportion of chain store sales to total sales will then decline.

I know that it has been claimed that chain stores are responsible for the high failure rate occurring among independent retailers. There is, to be sure a high mortality rate among small independent retailers, but the belief that chain stores are in some manner responsible for this high mortality rate is likewise without foundation. A little analysis will show its fallacy.

The failure rate among small independent retailers has always been high. Indeed, it was higher before chain store systems appeared in our system of distribution than it has since been. As early as 1840, General Henry A. S. Dearborn, then collector of the Port of Boston, in an address before the Massachusetts legislature said: "After an extensive acquaintance with business men and having long been an attentive observer of the course of events in the mercantile community, I am satisfied that among 100 merchants and traders not three in this city have acquired independence".

In the 1870's, David A. Wells, probably the best known American economist of that period, estimated that at least 90% of those who go into the retail business fail.

In his testimony before the Industrial Commission in 1900, John Wanamaker stated that only about 4% of all who embark in mercantile business succeed. He also quoted A. T. Stewart, a great New York merchant of the middle of the 19th century who died in 1876, who had claimed that only 2% of all retail dealers succeed.

[fol. 206] Much similar evidence might be added. The studies of the writer of this subject have been set forth in Chapter XIV, "The Failure Rate in the Retail Business", in his textbook, "The Economics of Retailing", first published in 1915 and revised in 1919, 1930 and 1932, and issued by the Ronald Press Company, New York City. A comprehensive study of this problem has also been made by Professor E. D. McGarry of the University of Buffalo and the results published in 1930 "Retail Trade Mortality for the City of Buffalo 1918-1928". Professor McGarry's conclusions accord with those of the writer to the effect that the failure rate in the retail trade is not specifically due to chain store competition and moreover that this failure rate is

lower today than it has been for many years and is considerably less than it was before chain stores made their appearance in the American distributive system.

Among the large numbers of small independent concerns in the retail trade, it is inevitable that many of them should fail and that their owners and managers should give them up. The chain stores are not responsible for these failures. The existence of chain stores merely serves as a convenient but fallacious excuse for the passing of such retail concerns.

Somewhat more than a generation ago the high failure rate in the independent retail trade was ascribed to the growth of department stores. During the period from 1905 down to 1915 the disappearance of small retailers was said to have been caused by the mail order houses, although the total volume of business transacted by the mail order houses never amounted to as much as 2% of the total national trade. After the present complaint that chain stores are forcing independent retailers out of existence has become out of date, there will, no doubt, be other reasons discovered and [fol. 207] advanced for the continuing failure of small independent retailers.

The argument that chain stores are driving small independents out of existence is very flimsy. The fact is that chain stores, like the department stores and mail order houses, have come into our system of distribution and, after a period of rapid growth, have settled down to become a definite and continuous part of it. Chains have made definite contributions to the improvement of all retailing. As a result of the chain store development the consuming public is buying better goods at cheaper prices, not only in the chain stores themselves, but also in independent stores as well, than would ever have been possible, if they had not come into existence.

As a result of the continual effort being made in the retail trade to secure and to hold the consumer's custom, this country not only enjoys the best retailing system it has ever had but it probably excels that of any other country in the world. So long as free, open and reasonably fair competition can be maintained on an active and healthy basis, the public will benefit.

In discussion concerning chain stores it has too frequently been assumed that chain store systems are immune from ordinary difficulties of business. There have been numerous failures, bankruptcies and liquidations in the

chain store field. Among grocery concerns that have suffered financial difficulties are Piggly-Wiggly Stores, Clarence Saunders Stores, Almar Stores, Epicure Food Stores and Red Ball Stores. In the variety trade, there have been outstanding difficulties in F. & W. Grand Stores, the Metropolitan Stores, McLellan Stores, McCrory Stores, National 5 and 10¢ Stores, Sterling Stores, and Schulte United. In the drug trade, there have been such failures and read- [fol. 208] justments as in Liggetts, the Owl Drug Company, National Drug Stores, Neve Drug Stores, Allison Drug Stores, Lane Drug Stores and Whalen Drug Stores. In addition to the above many others could be added.

It has also been claimed that chain stores do not contribute materially to the public welfare and that this therefore affords a reasonable basis for different treatment of such chains in matters of taxation. The fact is that the chains have made and are now making highly important contributions, both economic and social, to the public.

The chains by their example and successful competition have raised the standards of all retailing in methods of merchandising, in display and advertising, in lighting and cleanliness of retail stores. As must be admitted by all retailers, the chains have forced many economies into retail operation, and as a result have reduced the prices that consumers pay for their goods by considerable percentages.

Consumers of the State of Louisiana are everyhere paying less for their goods whether they buy from chains or independent stores, than they would if there were no chain stores competing for their business. How much less goods are generally priced because of chain store competition must of necessity be expressed as an estimate.

In my opinion, based upon my observation and studies covering many retail businesses, both chain and independent, in all sections of the United States and over a long period of time, and also considering the published reports of the operations of such retailing establishments, it is probably not less than 10% and may be as much as 20%.

Chain stores not only help to maintain lower retail price levels, but also to maintain higher wages and more stable employment for retail store workers. This is contrary to the statements made by critics and enemies of the chain [fol. 209] store system, but is the fact. In the State of Louisiana for the year 1933, according to the Census of

American Business, "Chains and Independents", page 37, the average annual earnings for full time employment for independent stores amounted to $765, and for chain stores amounted to $837. Chain store average wages in the State of Louisiana are actually nearly 10% higher than for independent store employees.

Misstatements as to wages paid by chain store employers usually arise from comparisons of retail establishments employing different classes of labor as for example, the wages paid to employees in independent furniture, men's and boy's clothing, jewelry stores and other establishments requiring highly skilled workers, with chain stores such as variety stores and department stores which are able to use and to give employment to workers of less experience and skill. Such comparisons are obviously unsound.

According to the U. S. Census of "Chains and Independents, 1933", chain store employees in Louisiana average higher annual earnings than in independent stores in the following classifications of trade: variety stores, men's and boy's clothing stores, shoe stores, furniture stores, grocery stores, combination grocery and meat stores, restaurants and eating places, cigar stores and stands, motor vehicle dealers, filling stations, hardware stores, drug stores, radio stores and family clothing stores.

The average annual earnings of independent store employees exceed those of chain store employees in the following businesses only: household appliance stores, department stores, women's ready to wear stores and jewelry stores.

These figures for the State of Louisiana, which are [fol. 210] typical for the entire country, refute the claim that chain stores pay their workers less than independent stores.

It has in some cases been urged that the rise and growth of chain stores is responsible for the decline in importance as trading centers of many small towns throughout the country. A moment's serious study of this matter will indicate that the decline of small towns, where there has actually been declines, has had nothing to do with the rise of chain stores. These declines would have taken place even if there had never been any chain stores. The main reason for the decline of trade in the smaller towns is, of course, the increased facility of transportation by rail and more especially the result of good roads and automobiles

and cheap, efficient bus service. It is the attractions of the larger cities that have caused the trade in smaller towns to decline. Chains have had nothing to do with this movement.

It has been frequently alleged that the chain store does not contribute to local social, civic, religious or educational development, and that because independent retailers, who provide substantial aid in these directions, are being driven out of business, the communities decline. It is, of course, true that many independent retailers do provide substantial leadership and support of local social developments, but it would be an error to assume that all, or even a majority of, independent retailers serve their communities in this manner. Most of them do not. In view of the very large number of independent retailers who have very insignificant businesses, how could it be otherwise? According to the U. S. Census of Retail Distribution for 1929, Distribution No. R 129, page 16, approximately two-thirds [fol. 211] (65.2%) of all the retail stores in the State of Louisiana had annual sales during 1929 of less than $10,000. More than 85% of all the retail stores in the State of Louisiana had sales in that year of less than $30,000. Obviously, with retail sales of less than $10,000 a year there can be no satisfactory self-supporting economic business unit. Most of such small concerns are merely marginal businesses, desperately trying to maintain a place in the distributive mechanism. In time some of these small concerns eventually become larger and successful. While small it is clear that they cannot be important factors either socially or economically in their respective communities.

In the meantime, chain stores have progressively taken more and more constructive attitudes towards support of local institutions in communities in which they have been located. There is in most respects fully as much reason for chain systems and their managers to take an active interest in the upbuilding of their respective communities as there is for independent merchants. Some chains have undoubtedly been slow in recognizing this fact. Others have given very serious study to this matter and such progress has been made as to indicate that all grounds for complaint along this line will vanish.

There is no evidence of any kind that independent retailers and their wholesale sources of supply require, or

are entitled to, any special protection or subsidy such as accorded by this law against chain store systems. There are thousands of independent retailers, small as well as large, who have amply demonstrated their ability to meet the competition of chain stores successfully. There is no secret or mystery about the conditions necessary to the successful operation of a retail store. These conditions are the same regardless of ownership whether independent or chain. They include: a convenient location accessible to [fol. 212] a sufficient number of consumers to run a store; a suitable building and equipment in which to carry on the business; carefully selected stocks of merchandise such as people want at the time they want them; fair competitive prices; good clean housekeeping; attractive display; courteous and intelligent sales service; suitable forms of publicity; and enough capital to finance the store, its purchase of goods, and where credits are granted, to carry customer accounts.

There is not a single element in this simple list in which independents with proper management and with proper application of intelligence and energy cannot do as well as, or better than, chain systems excepting possibly in the purchase of goods and in the use of certain forms of advertising. Chain store systems, because of the combined buying power of their separate units are able to purchase larger quantities of all goods handled and consequently buy them for less. A single independent retailer may not be able on his own to buy as advantageously as a chain, but by combining with a sufficient number of other independent retailers in the same lines of business for the purchase of goods he can, and does, do as well as the chains.

There has been a very rapid development of retail cooperative buying organizations and so-called voluntary chains. There are now more independent retailers organized under such retail cooperatives and voluntary chains than there are units in chain stores. These organizations enjoy the advantages of quantity buying and there is every indication that their member stores, when otherwise well managed, are meeting the requirements of their respective communities in suitable stocks of goods, with satisfactory service at prices which compare favorably with those at chain stores or elsewhere. Indeed, many of such well managed stores are apparently making greater gains in sales

[fol. 213] and a better showing all around than the majority of chain stores.

There are, moreover, inherent weaknesses in chain store operation which gives an advantage to the independent retailer. Most chains operate under highly standardized methods. Their individual stores are therefore more or less inflexible when it comes to meeting the individual requirements of particular communities and customers. It is in this respect particularly that independent retailers have shown themselves superior to the competition of chains.

(Sgd.) Paul H. Nystrom.

Sworn to and subscribed before me at New York, N. Y. this 16th day of March, 1936. (Sgd.) Morris Migden, Notary Public. (Seal.)

[fol. 214] In United States District Court

[Title omitted]

Affidavit of W. C. Sugg—Filed May 28, 1935

State of Louisiana,
Parish of Webster:

Before me, Myrtis Reavis, a Notary Public in and for Webster Parish, Louisiana, personally came and appeared W. C. Sugg, who, after being duly sworn, did depose and say:

That since 1917, and prior thereto, he has been a resident of the City of Minden, Parish of Webster, State of Louisiana, and since 1917, has been engaged in the dry goods business, retailing dry goods of all types, including shoes; that since 1917 he has handled in his retail store situated in the City of Minden, State of Louisiana, the same general type of merchandise.

Affiant further states that his business was of the type and financial backing of the average independent merchant throughout Louisiana; that from the opening of said business, affiant made reasonable returns on his investment and made sufficient money from the operation of said business [fol. 215] to enable he- and his family to enjoy the neces-ities and comforts of live enjoyed by the average American family.

That after the City of Minden had developed into a prosperous city of some 6500 people, had built her churches, had build schools, streets and made other public improvements, all built by the permanent residents of the the community and paid for by affiant through the medium of taxation and by others similarly situated, who owned property in the city, various and sundry chain store operators, some national, some sectional, found that the residents of the city of Minden had built a splendid little city, of which the populace was proud, and saw fit to establish in the city retail units of their system. The influx of the chain stores started prior to 1929, the date of the beginning of the present depression.

The chains above referred to entered the City of Minden in practically all lines of business, grocery, general merchandise, clothing, drugs, and others. These retail units owned and operated by the chains did not purchase property in the city of Minden, with one exception, and that is a sectional chain. In most instances the chains brought its own employees, paid them small wages, and set out to undersell and by so doing, destroy the local and independent merchants who had, through the years, built up a community of which they were proud, and of which they boasted good streets, fine public buildings, churches and the like. These new retail units, in practically every branch of business, immediately upon entering the city of Minden, set out to undersell the local independent merchants.

[fol. 216] Affiant further states that prior to the influx of the chains there was abundant competition, but all the competitors were practically on the same footing; that is, they were all compelled to buy from wholesalers for the reason that they did not purchase goods in sufficient quantities to warrant direct buying from the manufacturer. They all paid their proportionate share of the taxes, practically all owned their own buildings, and in general, operated in the same manner. This competition prior to the influx of the chain retail units, gave the consuming public the benefit of any low cost.

The situation prior to the influx of the retail chain units in the city of Minden developed men of character and independence, furthered independent thought, and was conducive to better citizenship. The fact that these business men owned their own place of business and their own homes,

and in — community owned the city in which they lived, created a hope and enthusiasm enjoyed only by those living under such conditions.

Affiant further states that, by underselling the local independent merchants, the chains, since their influx, starting back around 1925, have gradually eliminated the independent merchants in the city of Minden, that, one by one, they have taken bankruptcy or been placed in the hands of receivers and their assets disposed of for benefit of creditors. This condition has continued since the influx of chains, and at the present time, every independent merchant in the city, including affiant, is operating at a loss, and unless some action is taken to place the independent merchant on a fairer plane and better enable him to compete with retail chain units, it is only a question of time until there will not be an [fol. 217] independent merchant lift in the city of Minden. This statement is true of practically every line of business.

Affiant is a comparatively young man, and has endeavored to keep abreast with modern trends of marketing and buying. Affiant has made a practice to purchase as near the source of manufacture as possible, buying from wholesalers at St. Louis, Cincin-atti, New York, Baltimore, making seasonal trips to said sources of supply for the purpose of picking suitable merchandise and obtaining as good prices as possible. Affiant has demanded at all times that he be sold goods as cheaply as any one else, but affiant has been unable to obtain any special discounts, advertising, allowances, brokerage fees or any other allowances that are not shown on the face of the transaction, that is, the one or two per cent allowed ever-one if the statements are paid within certain specified times.

Affiant has examined the answer filed in the above and foregoing suit, especially Paragraph 88 of same, and states that he receives no such allowances or discounts from any one from whom he purchases his goods, such as named in said paragraph.

Affiant further states that the stock of goods he carries is of average size, and that his purchases are not sufficiently large to warrant shipment in carload lots but come by packages by local freight or express, whereas the retail chain operators with units in the city of Minden, competing with affiant have a great number of units, one of them 47, one 10, and others with more than 10, which enables his

competitors, because of the purchasing power created by all units, irrespective of location, whether within or without Louisiana, to buy and ship in carload lots to their centrally located warehouses and there distribute to the individual retail units.

[fol. 218] —Further states that he has made a careful study of the subject of merchandising, purchasing power, and all the various phases involved in retail distribution, and knows that as a general proposition, the greater number of retail units operated by a chain the greater the purchasing power of the chains and the greater the discounts, advertising, allowances, and other concessions given to said chain operators by wholesalers and manufacturers; that when an operator has several retail units, he can avoid buying from the wholesaler and can purchase directly from the manufacturer, and buy in larger quantities, thereby saving the wholesaler's commission together with the cost in transportation.

Affiant further states that all retail units in a chain or system, contribute to the central purchasing power, this being true irrespective of the location of the unit. In other words, if a retail chain operates one hundred stores in Louisiana, one hundred in Texas, one hundred in Minnesota, one hundred in Arkansas, and one hundred in Mississippi, each and every retail unit, irrespective of location, contributes to the central purchasing power of the chain, it being the practice of chains to have a central purchasing agency for all the units and behind each retail unit is thrown the tremendous purchasing power created by the entire chain or system. And if, for example, a chain of 15000 units has only one unit in the State of Louisiana, the entire purchasing power created by all the units is behind the one unit located in Louisiana. In other words, retail units outside of Louisiana contribute materially and substantially to the effectiveness of the operation of a retail unit within Louisiana, in purchasing power, advertising, and other advantages.

Affiant further states, that, from his study of chain retail units and methods of operation, etc., and from his experi- [fol. 219] ences in purchasing from wholesalers and attempted purchases from manufacturers, and from his

knowledge acquired from the experience in operating said business since 1917, states that the greater the number of retail units, the greater the advantages accruing to the operator and that no maximum is reached. For example, when the retail units increase to enormous proportion the operator may engage in manufacturing, operate his own brokerage establishment, thereby making brokerage fees, and be in a position to demand further concessions from manufacturers.

Affiant further states that he is thoroughly familiar with the business conditions in the city of Minden, and that, at the present time, over fifty per cent of the retail trade in Minden, is done by chain organizations that have come into the city of Minden after the town was established, after schools were built, after roads were built, and paid for, and that said chains came into the city of Minden for the reason that it was a splendid city. Affiant further states that said chains have moved into the city of Minden and are now occupying buildings formerly occupied by independent merchants who have gone out of business because of their inability to compete with the chains; that chains are merely renting the properties and are here, not for the purpose of building the town, as is shown by the method of handling their business, but here solely for the purpose of underselling local independent merchants and thereby obtaining a monopoly on the retail trade in the city.

[fol. 220] Affiant further states that is is thoroughly cognizant of conditions in other cities and towns in northwest Louisiana, and that conditions in that section are the same as those in the city of Minden with reference to the influx of retail chain units, as is described in this affidavit.

— Further states that he has done everything humanly possible to endeavor to operate his independent business, housed in one store, so as to compete with the retail chain units in the city of Minden, that he has studied new methods of merchandising, the new methods of buying, the new methods of advertising, new methods of displaying the merchandise within the store, and has done all else to maintain his business, but that since the influx of the chains, in competition with him, his business has gradually decreased, and for the past number of years has drawn on the surplus made prior to the influx of the stores and had it not been for this surplus he would have had to close his doors several

years ago. Further states that he wishes it were possible for the court to make a trip with him throughout north Louisiana and observe existing conditions as relates to the matters herein referred to.

Affiant further states that he daily comes in contact with persons who have been reasonably prosperous, independent retailers in years gone by, men who have contributed their energy and funds toward up-building of the city of Minden, and who have been unable to compete with the operators of retail chain units in the city. That some of these men are out of employment, and some of them now have been employed by the operators of the chains at meager salaries.

Affiant further states that the chains continue to increase in the number of units in this section of Louisiana; that within the past three years the Great Atlantic & Pacific Tea Co. has entered the field in Minden by establishing a [fol. 221] retail unit whereby grocercies, fruits, etc., are sold; said company rents a building that was formerly operated by an independent merchant who had operated in the city of Minden for a decade and had established himself as a prominent citizen, having been President of the bank, President of the Building & Loan Association, and had possibly done more to the up-building of the community than any other one man. The independent merchant operated in part the same line of business operated by the A. & P., and now the A. & P. is located in said building in lieu of one of the men recognized in this community as a builder, said independent merchant having been unable to compete with the chain store prices.

Affiant further states that if the independent merchants continue to decrease in number, and the chains increase as they have in the city of Minden since 1925, that it is only a question of time until retail chain units will be the only retailers in the city of Minden, which condition is one not favored by thinking persons, and is not conducive to the welfare of the people of this locality.

(Signed) W. C. Sugg.

Sworn to and subscribed before me on this the 15th day of October, 1935. (Signed) Murtis Reavis, Notary. (Seal.)

[fol. 222] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF A. D. TURNER—Filed May 28, 1935

STATE OF LOUISIANA,
Parish of Webster:

Before me, the undersigned authority, personally came and appeared A. D. Turner, who, after being duly sworn, did depose and say:

That for the past tweny-five years and longer, he has been a resident of the city of Minden, Webster Parish, Louisiana; that he served as President of the Bank of Webster in the City of Minden for a period of twenty years and was President of the Minden Building & Loan Association for approximately the same period of time, and during which time the Minden Building & Loan Association grew to a million dollar concern; that affiant served as Mayor of the City of Minden for a period of six years and was — member of the Webster Parish School Board for a period of ten years.

Affiant further states that for the past twenty-five years he has conducted in the city of Minden a retail business, selling general merchandise at retail, and operating a grocery store and meat market. Affiant further states that at one time, during 1925 and 1926, affiant's business was one [fol. 223] of the largest if not the largest, retail establishment outside the cities of Monroe and Shreveport, in North Louisiana, and in 1925 affiant's gross sales were in excess of $250,000.00.

Affiant further states that during his residence in the city of Minden, he has promoted and encouraged civic development and has borne his share of taxes to pay for schools, streets, roads, court house, and other public improvements. That after the citizenship of the city of Minden had developed a thriving city, and had practically paid for all public improvements, chain operators believed that city a good place to exploit. Therefore, from 1925 to date there has been a steady influx of retail chain units, handling practically all lines of merchandise, including variety stores, general merchandise, groceries, meats, etc.

Affiant further states that since the influx of the retail chain units selling merchandise similar to that retailed by

affiant, that is, general merchandise, grocery and meats, affiant's business has steadily declined for the reason that the chain units were in position, because of their purchasing power created by the total units in the system or organization; to purchase directly from the manufacturer, and much cheaper and at lower cost than affiant.

Affiant further states that he has endeavored to purchase as cheaply as possible in order to compete with the retail chain units, but he has found it impossible to meet the competition for the reason that, operating only one retail unit, he does not have the volume of business, therefore, the bargaining power, to demand and receive discounts, concessions and other advantages from the manufacturers, but on the contrary is compelled in most instances to buy from wholesalers.

[fol. 224] Affiant further states that retail chain units are monopolizing the retail trade in the city of Minden, and are, in fact, doing most of the business in the city at the present time, and if something is not done to check the devastating effect of the chain units underselling the small operator, it is only a question of time until there will be no retail units in the city except chains.

Further states that from his experience, and his knowledge of buying over a period of twenty-five years, knows that the greater the amount of purchases, the greater the buying power, and the greater the advantages afforded the operator. Further, that the greater the number of units in the chain or system, the greater the buying power and the greater the opportunities in purchasing at lower costs, lower costs of distribution, lower costs in advertising and many of the other advantages accruing to such operators.

Further states that retail units of a system, wherever situated, if all purchases are made by one central agency, as is done in the case of general chain stores, then each unit, wherever situated, contributes to the purchasing power created by the entire set of units behind each unit, and enures to the benefit of each unit and gives each unit the multiple advantages growing out of the operation of chain system of retail stores.

Affiant further states that he has been in the retail business selling groceries and meats for a number of years and is thoroughly familiar with the trade; that through-

out the United States grocery stores carry the same general line of merchandise, as do meat markets, the types of articles varying very little.

[fol. 225] Affiant further states that, with one exception, the chain retail units in the city of Minden do not own the buildings in which they operate, and the one that does own its property is a sectional chain, operating ten stores.

Further states that chain stores, as a rule, do not cooperate with the permanent citizenship of the local community in furthering high school athletics or other forms of community activities which tend to build up a community.

Affiant further states that from his knowledge and experience gained over a period of time aforementioned, that the greater the number of units, the greater the advantages accruing to the operator, irrespective of the location of the units.

(Signed) A. D. Turner.

Sworn to and subscribed before me on this the 16th day of October, 1935. (Signed) Myrtis Reavis, Notary. (Seal.)

[fol. 226] In United States District Court

[Title omitted].

Affidavit of C. B. Ellis—Filed May 28, 1935

State of Louisiana,
Parish of East Carroll:

Before me, the undersigned authority, personally came and appeared, C. B. Ellis, who after being duly sworn, did depose and say:

That he is a resident of the Parish of East Carroll, State of Louisiana; that he is one of the owners of Ellis Stores, Incorporated, a Louisiana Corporation, which operates five stores, three in Louisiana, and one in Leland, Mississippi and one in Eudora, Arkansas.

Affiant further states that all of said stores sell at retail merchandise of a general nature, being priced from five to twenty-five cents, and are in competition with Kress and Woolworth stores, and smaller chains and independents selling the same class of merchandise.

Affiant further states that he managed one of the stores

operated by S. H. Kress Co., for a period of six years, and is somewhat familiar with the operation of the larger chain retailers.

Affiant further states that, from the knowledge obtained while employed by the said Kress Co., and while operating [fol. 227] his present stores, he knows that the greater the number of units in a chain, the greater the purchasing power of the whole system, which is usually done by a central purchasing agent.

Affiant further states that in the matter of purchasing power, all the units in the chain contribute to the central purchasing power of the chain or system, and this is true, irrespective of state lines, and location of the stores; affiant further states that his stores in Mississippi and Arkansas contribute to the purchasing power of his chain just as much as if they were located in the State of Louisiana, and the fact that the two stores are across state lines makes no difference in the multiple advantages accruing to him by virtue of the fact he operates a chain of five stores.

Affiant further states that he has multiple advantages accruing to him and his corporation by virtue of the fact he operates five stores, and that he enjoys an advantage in purchasing power, low cost of distribution, lower cost of operation and the like, over a person operating four stores, or three stores, or two stores, or the independent merchant, and likewise, the operator of six or more stores has a distinct advantage over him, in other words, the greater the number of units in a chain, the greater the advantage accruing to the operator in purchasing power, cost distribution, etc.

Affiant further states that the larger chains enjoy a distinct advantage over his chain in that they can afford, and do afford, instructors who train the managers and other personnel in the various stores in the art of proper-displaying merchandise and commodities. He knows of his own knowledge that this is done, and it is a distinct advantage.

Affiant further states the greater the size of the chain, the greater the ability to keep experienced buyers at the [fol. 228] source of supply, thus obtaining better prices and better merchandise; for example, when he was employed by Kress that company kept a buyer in France

purchasing Val lace, and as a result obtained a finer line of merchandise at a lower price than the smaller chains could, and that the independent merchant could not in any manner enjoy this advantage.

Affiant further states that the greater the chain, the greater the opportunities to avoid buying from jobbers and wholesalers, and the greater the ability to buy directly from the manufacturer, thus obtaining much lower prices.

Affiant further states he knows that persons owning their business are better citizens and have a greater interest in upbuilding the cities in which they live.

(Signed) C. B. Ellis.

Sworn to and subscribed before me on this the 17th day of October, 1935. (Signed) Edwin F. Stevens, Notary Public. (Seal.)

[fol. 229] In United States District Court

Affidavit of E. M. Steen—Filed May 28, 1935

State of Louisiana:
Parish of Ouachita:

Before me, the undersigned authority, personally came and appeared E. M. Steen, who, being duly sworn, deposes and says: That he is owner of the Jitney Jungle stores in the following towns: Monroe, Lake Charles, Rayville and West Monroe, and that he owns eight stores. That most of his goods is bought direct from the manufacturer and he does not purchase them from the local wholesale houses; that he can buy goods cheaper than the independent grocer can purchase them for the reason that he pays no wholesale commission and for the further reason that he buys in larger quantities; that the greater number of units in the chain as a general rule means that the chain has a greater purchasing power. The chain with the larger purchasing power can buy goods cheaper.

Affiant swears that it is impossible for him to compete with an organization with the purchasing power of the Atlantic & Pacific Tea Company, first, because the enormous purchasing power of this company gives them a decided advantage in rebates and in the purchase of their goods; second, because their large operations permit them to ope-

rate upon a smaller margin of profit and the said Atlantic & Pacific Company could operate at a small loss in the towns in which your affiant is located, driving your affiant out of business, and makes its profits from other towns in which there is no competition. Affiant swears that he purchases very few articles from the local wholesalers and that your affiant is in direct competition with the purchasing power brought into Monroe, Louisiana by the Atlantic & Pacific Tea Company store located in said town. Affiant states that the Atlantic & Pacific Tea Company can sell goods at their cost and that their rebates are of such size to show a considerable profit; that your affiant, due to the smallness of his chain, is unable to secure any rebates sufficient to operate upon and would, therefore, go broke should he attempt to sell at cost.

(Sgd.) E. M. Steen.

Sworn to and subscribed before me on this the 17 day of October, A. D. 1935. (Sgd.) Murray Hudson, Notary Public. (Seal.)

[fol. 230] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOE ISAACMAN—Filed May 28, 1935

STATE OF LOUISIANA:
Parish of Ouachita:

Before me, the undersigned authority, personally came and appeared Joe Isaacman, who, being duly sworn, deposes and says: That he is Vice-President and General Manager of Monroe Furniture Company, Ltd., a furniture chain of five stores situated in Louisiana and Mississippi. Affiant swears that the chain system has many advantages to that of the one store operation in that the increase volume brings about an increase in purchasing power which means a lower unit cost; that said increased volume can be handled by the same executive force as the one store operation, which results in a saving in executive cost.

Affiant swears that most chains operate under a centralized backing system, that is to say, they do not carry in the community separate bank accounts but merely use the local banks for depositing their money, immediately drawing exchange on New York for the forwarding thereof; that the account is one which the banks can not use to loan and is

not profitable to said banks. That in Monroe, Louisiana none of the chains borrow from the local banks but the same are all financed out of New York City and affiant swears that to his personal knowledge none of the national chain stores in Monroe of any size own their own property. Affiant swears that when he installs a store in any locality, either in the state or out of the state, he takes into that locality the full amount of the purchasing power of the entire chain of which that store is a member and throws into direct competition with the other stores there the said purchasing power and lowered cost operation. That it is an undisputed fact that the larger the purchasing power the lower the original cost of the commodity and the greater the advantages to the entire system. These advantages are enjoyed by the individual unit, wherever located.

(Sgd.) Joe Isaacman.

Sworn to and subscribed before me this, the 18th day of October, A. D. 1935. (Sgd.) Henry Bernstein, Notary Public. (Seal.)

[fol. 231] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF A. A. ALLEN—Filed May 28, 1935

STATE OF LOUISIANA,
Parish of East Baton Rouge:

Before me, the undersigned authority, personally came and appeared, A. A. Allen, who, after being duly sworn, did depose and say:

That he is, and has been for a number of years, engaged in the retail grocery business, and is, at the present, the owner and operator of two retail grocery units in the City of Baton Rouge, East Baton Rouge Parish, Louisiana.

Affiant states that, for a period of six years, he was general manager of a chain of retail grocery units in the City of Baton Rouge, and, at the time affiant assumed the general managership of said chain, the chain had a total of fifteen stores in the City of Baton Rouge, and during his administration of the affairs of said chain, their number of units increased to thirty-two stores in the City of Baton Rouge, and surrounding territory, practically all of them,

however, being located in the City of Baton Rouge proper.

Affiant further states that he is thoroughly familiar with [fol. 232] the method of operation of chains, their methods of buying, and other administrative phases.

Affiant further states that the purpose and policy of the chain organization for which he worked, and which now has a monopoly on the retail grocery cash and carry trade in the City of Baton Rouge, was to destroy competition by putting out of business the independent retail grocers, and that this policy or aim has been accomplished, there being very few independently owned stores left in the City of Baton Rouge.

Affiant further states that it was the practice of the chain that employed him during said six years to open a unit next to, or in the vicinity of, an independent retailer, and to slash prices to such an extent that the independent retailer was forced to close his doors, the chain being in a position, because of its size and financial backing, to take care of any loss incurred in the unit used as a weapon to destroy the independent operator.

Affiant further states that, for example, such practice as the following was used during said period of elimination of independently owned retail grocery stores in Baton Rouge during the period aforesaid; take, for example, if an independent retailer received a large shipment of perishable products, such as vegetables, the chain operator which employed affiant, would obtain similar products and place them in the retail unit belonging to the chain next to, or in proximity to, the independent retailer, and slash the price, and, if necessary, sell below cost, thereby supplying the trade, and compelling the independent retailer with the perishable goods to either permit his goods to rot or spoil on his hands, or take a loss, and ordinarily, the small independent operator, with small capital behind his business, could not [fol. 233] stand any such onslaught by the chain operator, and, therefore, the independent retailer would be compelled, within a short time, to close his doors, leaving the chains with a monopoly on the business in that area, and the public at the mercy of the chains, in the matter of prices. These onslaughts and attacks were systematically carried out until the City of Baton Rouge, the Capital of the State of Louisiana, with upward of thirty thousand people, is served by a concern having a monopoly on the retail grocery trade of the City, with the exception of a few independent merchants

extending credit, and this type of merchandising is rapidly disappearing.

Affiant further states that the description of the system hereinabove referred to, as practiced by the chain in control of the retail grocery trade in Baton Rouge, and used by said chain in gaining its monopoly, is accurate, and affiant makes these statements with full knowledge of what took place, and what is taking place, having engineered the operations of said chain for a period of six years as its general manager.

Affiant further states that the practices described herein were and are made possible by virtue of the fact that the chain was operating several units, that is, fifteen and above, depending upon the time; that by the operation of said units, the chain enjoyed a tremendous purchasing power, and the many other advantages accruing to the operator of multiple units; that each unit of said chain contributed to the central purchasing power of said organization as a whole. Affiant further states that all units of a chain contribute to the central purchasing power of an organization, irrespective of the location of the units.

Illustrating the above statement, affiant states, that, the coffee buyer of the Great Atlantic & Pacific Tea Company, for example, buys the coffee for all the units operated by said concern; likewise, the central purchasing agent for the Great Atlantic & Pacific Tea Company, buys all the [fol. 234] oleomargarine needed by the units of the Great Atlantic & Pacific Tea Company, from one or more concerns, but the total purchases of any one product, by the central agency, is the total amount the entire organization will use. In other words, every unit of the Great Atlantic & Pacific Tea Company contributes to the central purchasing power, and that central purchasing power is behind each unit operated in Louisiana.

Affiant further states that, for example, when he was employed as general manager of one of the chain- which now has a monopoly on the cash and carry trade in Baton Rouge, which is practically the entire trade of the City, he had the following experience with a wholesaler: Affiant learned that this wholesaler was quoting oleomargarine to a local Atlantic & Pacific Tea Company store at 2¢ per pound less than said wholesaler was quoting said commodity to affiant's chain. Affiant strenuously protested this fact. Being the general manager of a chain of fifteen or more stores

in the City of Baton Rouge, and the Great Atlantic & Pacific Tea Company with only five or six stores in the City, affiant contended that he was entitled to buy olemargarine as cheaply as said wholesaler was selling it to the Great Atlantic & Pacific Tea Company. The agent for the wholesaler in Baton Rouge explained that the price on the oleomargarine made to the Great Atlantic & Pacific Tea Company came from the manufacturer of the product in Chicago, and notwithstanding affiant's protest, he was unable to buy it at the price made to the Great Atlantic & Pacific Tea Company. Affiant states this conclusively shows the contribution of the entire number of units operated by the Great Atlantic & Pacific Tea Company to the units of the system situated in the City of Baton Rouge, and shows conclusively that the enormous purchasing power created by the entire system is behind each unit operated in the [fol. 235] system. In other words, had it not been for the tremendous purchasing power created by the entire system of over fifteen thousand units, the few units in the City of Baton Rouge would have been unable to buy oleomargarine two cents per pound cheaper than affiant, when he was general manager of fifteen units. In other words, the purchasing power created by the entire system of units of the Great Atlantic & Pacific Tea Company was, and is, behind every unit operated by the concern, and the benefits accruing by virtue of the operation of multiple units enures to every unit operated, as the illustration above conclusively shows.

Affiant further states that chain organizations, by virtue of their enormous purchasing power, can and do destroy years of work and building by jobbers and wholesalers in the following manner:

If X Company is a wholesaler in the City of Baton Rouge, and Y Chain stores demand a certain price on a commodity which the X Company has advertised for fifteen or twenty years in the community, and has created a public demand for the commodity, and the wholesaler or jobber is unable to meet the demand and make a fair return, it is the custom and practice of chain organizations to buy that commodity elsewhere, (the manufacturer not being willing to sell the chain because the wholesaler or jobber has an exclusive agency), then the Y Chain will sell said commodity in the territory originally served by X Company, and sell the commodity, if necessary, below the price that the X

Company can buy the product from the manufacturer. This practice continued for a while will ruin the business of X Company, and very probably cause X Company to quit handling the commodity. Then Y Chain system can buy the commodity direct from the manufacturer in large quantities for the entire organization, and undersell the independent merchant who is not in a position to buy in such quantities [fol. 236] that justifies the manufacturer to sell to him direct. This is another example how chain organizations, through their tremendous purchasing power and large financial backing, can gain control and monopoly of the trade on certain commodities.

Affiant further states that chain organizations will not come into a town or city unless it is a thriving community, one that has been built up by the citizenery, with schools and roads and all public improvements completed. It is this type of community that chain stores seek to exploit, and there is no better example than the City of Baton Rouge, Louisiana. Third Street, the principal street of the City, originally lined with stores operated by independent merchants, which merchants built the City of Baton Rouge, paid taxes and paved the streets, built schools and established a desirable place in which to live, is now lined with chain stores handling practically every line of goods, and there are only two independent firms of any consequence on said street.

Take, for example, the F. W. Woolworth Store. This store is located on Third Street in a building formerly occupied by an independent merchant. The entire purchasing power of the Woolworth chain is behind this unit. The same can be said of every chain situated on Third Street and on other streets of the City of Baton Rouge.

Affiant further states that the onslaught made on the City of Baton Rouge by chain stores is a menace to the community, and chain ownership does not tend to develop good citizenship. Affiant further states that the conditions described above as existing in the City of Baton Rouge are similar to those elsewhere in Louisiana.

Affiant states that a person who owns his own business is more interested in the upkeep of the town, the development of the City, and makes a better citizen of the City of Baton Rouge than a person employed in a chain unit where he is simply a "cog" in a machine and is at liberty to exercise [fol. 237] little or no initiative, and is paid a meager wage.

Affiant further states that at the present time, he operates two retail grocery units in the City of Baton Rouge; that each unit contributes to his purchasing power, and that the greater the number of units in the chain, the greater the purchasing power, and the greater the ability to undersell and stifle the independent merchant, or those operating a lesser number of units.

(Signed) A. A. Allen.

Subscribed and sworn to before me on this the 22 day of November, 1935. (Signed W. A. Cooper, Notary Public. (Seal.)

[fol. 238] Copy

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF CLARK FAULK—Filed May 28, 1935

STATE OF LOUISIANA,
Parish of Ouachita:

Before me, the undersigned authority, personally came and appeared Clark Faulk, who, being duly sworn, deposes and says: That he has been in the grocery business in Ouachita Parish for 30 years and that he is at present practically the only independent grocer of any size still located in the City of Monroe, Louisiana; that formerly all of the groceries were owned by local citizens and the general method of doing business was to purchase their groceries from the local wholesalers but at the present time chain stores of one kind or another have come into Monroe and now control over ninety per cent. of the grocery output of this city. That Monroe, Louisiana is a town of approximately thirty thousand inhabitants but due to the great growth of the chain stores who purchase their goods wholesale and direct from the manufacturer, practically all of the other independents have been driven out of business. Affiant swears that it is a known fact that the chain stores can purchase their merchandise for a considerably lower price than your affiant and the only way your affiant has been able to keep his trade is by operating a credit business which the chains refuse to operate, and, being the only credit grocery company in Monroe, he has been able to stay in business.

Affiant swears that he owns his own property and has been a resident of the Parish of Ouachita for 40 years; that if something is not done to equalize his business with the enormous purchasing power brought into this locality by the [fol. 239] chain stores who are operating here, it will only be a question of time when all the grocery business in this town will be operated by chain operation.

(Sgd.) Clark Faulk.

Sworn to and subscribed before me on this, the 26 day of October, A. D. 1935. Murray Hudson, Notary Public. (Seal.)

[fol. 240] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF B. MORGAN—Filed May 28, 1935

THE STATE OF TEXAS,
County of Jasper:

Before me, the undersigned authority in and for said County and State, on this day personally appeared B. Morgan, who is personally well known to me and known to me to be a reputable citizen of the City of Jasper, Jasper County, Texas, and one whose oath is entitled to full faith and credit, and after having been duly sworn by me deposes and states upon oath as follows:

My name is B. Morgan. I am forth-two years of age and have resided in the City of Jasper, Jasper County, Texas, for fourteen years.

I am general manager and purchasing agent for Morgan & Lindsey, and have held such position with Morgan & Lindsey since its organization in the year 1921.

That Morgan & Lindsey operates twenty-eight (28) stores in the State of Louisiana.

That I have been maintaining a residence at the Jung Hotel in the City of New Orleans, State of Louisiana, for the last six years, and that I have likewise been maintaining a purchasing office on behalf of Morgan & Lindsey for the last six years at 503 Audubon Building in the City of New Orleans, State of Louisiana.

As such purchasing agent for Morgan & Lindsey, I further state upon oath as follows:

I find that the national chain stores have an advantage over the Morgan & Lindsey chain stores because of their

buying power—receiving rebates and advertising allowances that the Morgan & Lindsey chain are not able to obtain, as said Morgan & Lindsey cannot use the volume of merchan-[fol. 241] dise that the national chains use.

That many factories refuse to sell to Morgan & Lindsey their merchandise because all their production and out put is taken up by national chains.

Further affiant sayeth not.

(Sgd.) B. Morgan, General Manager and Purchasing Agent for Morgan & Lindsey.

Sworn to and subscribed before me this 23rd day of November, A. D. 1935. (Sgd.) Mildred Lanier, Notary Public in and for Jasper County, Texas. (Seal.)

[fol. 242]. In United States District Court

Affidavit of J. W. Baker, J. S. Trisconi, J. W. Elston, W. C. Marshall and J. H. Brown—Filed May 28, 1935

State of Louisiana,
Parish of Caddo:

Before me, the undersigned authority, on this day came and appeared J. W. Baker, J. S. Trisconi, J. W. Elston, W. C. Marshall and J. H. Brown, who after being first duly sworn, deposed and said:

That they are independent wholesale grocers, domiciled in the State of Louisiana, serving the independent retail merchants of Northwest Louisiana, and depend upon such independent merchants for their livelihood.

That they are able to do very little, if any, business with national chain store organizations, due to, not only so called buying advantages enjoyed by these chain store organizations, but more particularly because of taxation advantages that these chain systems have. An illustration of this is, the undersigned wholesale grocers pay to the state, parish and city tax bodies thousands of dollars annually in the form of occupation licenses, based on the volume of business that we do, an ad valorem tax based on the value of our floor stocks. Our independent retail customers likewise pay identical taxes. On the other hand, stores, or a store, owned by a national chain organization is not called upon to pay a

wholesaler's occupation license and ad valorem tax, but only has to pay the retail grocers' tax and license. The merchandise sold through these stores is generally furnished by trucks from out of state warehouses. All of these taxes are burdens on the merchandise and the chain organizations avoid part of this burden and are thereby able to save that much.

The undersigned and our customers are called upon to make frequent and substantial contributions to local charity and local civic organizations. We have no desire to avoid this, but on the other hand are glad to discharge this public duty. The outlay in this respect runs into thousands of dollars per year, and such expenditures are generally [fol. 243] avoided by the chain stores, for the reason that their local manager has no authority in these matters and contribution is avoided thereby.

Within the past ten years in our trade territory three wholesale grocers, well established for over twenty-five years, have liquidated their businesses, due to inability to operate profitably, because of reduced volume of business, due to a considerable extent to diversion of volume from independent retail merchants to chain stores. If the large national chain stores are permitted to continue operating with unfair advantages it will eliminate a large number of independent merchants, which would tend to create a monopoly, increase unemployment and be ruinous to the public.

It is a fact, well known to us, that the chain store method of merchandising tends to disregard the local independent wholesale grocer. The stores owned by these chain systems, whether they be one or many within our state, draw their supplies from scattered warehouses, mostly out of the state, owned and maintained by their system. If a chain organization, therefore, has within the state only one store, and in other states thousands of stores, that one store has the same advantages as the stores located outside the boundary of the state.

(Signed) J. W. Baker. J. S. Trisconi. J. W. Elston. W. C. Marshall. J. H. Brown.

Sworn to and subscribed before me, Notary, on this the 27th day of November, 1935. John T. Bundrick, Notary Public. (Seal.)

[fol. 244] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF W. E. PENICK—Filed May 28, 1935

UNITED STATES OF AMERICA,
State of Louisiana,
Parish of Orleans:

Before me, the undersigned authority, a Notary Public duly commissioned and qualified in and for the Parish and State aforesaid, this day personally came and appeared W. E. Penick, a resident of the City of New Orleans, to me personally known, who being first duly sworn, deposes and says:

My name is William E. Penick. I am Vice-President of the H. G. Hill Stores, Inc. and as such am the executive head of said corporation.

The Great Atlantic & Pacific Tea Company has filed a suit entitled "The Great Atlantic & Pacific Tea Company, Plaintiff, versus Alice Lee Grosjean, Supervisor of Public Accounts, and Gaston L. Porteria, Attorney General of the State of Louisiana, Defendants", attacking the constitutionality of Act #51 of the Legislature of the State of Louisiana for the year 1934. In this Bill of Complaint the Great Atlantic & Pacific Tea Company averred as follows, to-wit:

"• • • That said corporation (referring to H. G. Hill Stores, Inc.) is engaged in the State of Louisiana in precisely the same character of business as plaintiff under the same conditions • • • (Article #15 of Bill of complaint.

This statement is not correct and is misleading. Affiant, therefore, feels compelled to make this affidavit pointing out to the Court some of the essential differences between the operations of chains of great magnitude such as the Great Atlantic & Pacific Tea Company and the operations of small chains such as the H. G. Hill Stores, Inc., local wholesale jobbers and independent retailers.

[fol. 245] The H. G. Hill Stores, Inc. is a local organization having neither a sectional nor national scope. Its purchasing power is limited to and by the needs of its ninety-two (92) stores. The purchasing power which it possesses may properly be compared to that which is possessed by a number of other local wholesale jobbing houses, many of whom purchase merchandise for and service a greater num-

ber of stores than belong to the Hill Store Organization. Contrast this with the operations of a chain such as the Great Atlantic & Pacific Tea Company which possesses a purchasing power so great as to enable it to fill the requirements of its fifteen thousand two hundred retail outlets. The advantages which accrue to a chain such as the Great Atlantic & Pacific Tea Company as a consequence of its great purchasing power and from other factors which work in favor of an operation possessed of the bigness and wide scope of the Great Atlantic & Pacific Tea Company are obvious. They are such as to definitely and completely differentiate its operations from those of the small chain, the local wholesaler and the independent retailer. Some of the many material advantages possessed by a large chain of the type of the Great Atlantic & Pacific Tea Company which serve to differentiate its operations from those of the small chains such as the H. G. Hill Store, the local wholesale grover and the independent retailer are the following:

(1) The Enormous Purchasing Power of The Great Atlantic & Pacific Tea Company places it in a superior position. (Sales approximate one billion dollars per annum and have exceeded this figure—sells one-tenth of all food sold at retail in the United States of America.

(a) Result—Manufacturers pay the sum of $6,105,000 per annum to the Great Atlantic & Pacific Tea Company by way of special, secret concessions and rebates over and above the usual trade discounts and rebates.
[fol. 246] Similar sums have been received by it in preceding years. These facts have been admitted by the duly accredited representatives of the Great Atlantic & Pacific Tea Company in their testimony before the Special Committee appointed by the House of Representatives to investigate the American Retail Federation. The testimony in part of their representatives appear- on page #461 of the report of this Committee and is as follows, to-wit:

Interrogator (Mr. Lucas): "In other words, through these contracts The A. & P. Co. received, in rebates, a total amount of $6,105,000 for the year 1934?"

Mr. Gundrey, a duly accredited representative of the Great Atlantic & Pacific Tea Company testified: "Yes."

"Mr. Chairman, one more question. That does not include your profits on brokerage?"

"Mr. Lucas: What is the total amount". (Referring to discounts and brokerage.)

"Mr. Gundrey: The total amount is $6,105,000, plus brokerage earnings of about $2,000,000."

"Mr. Lucas: Then you have $8,105,000 in rebates and brokerage?"

"Mr. Gundrey: I should say, in round figures."

At this same hearing it was also brought out that no special record was kept by the Great Atlantic & Pacific Tea Company of the manner in which it disbursed these special discounts.

These special rebates and brokerage give to the Great Atlantic & Pacific Tea Company a per store advantage of more than Five Hundred and Thirty ($530.00) Dollars per annum (year 1934), which in the nature of things cannot be obtained by small chains such as the H. G. Hill Stores, local wholesale grocers, and other independent retail units.

[fol. 247] (b) The Great Atlantic & Pacific Tea Company (and other large chains) operates its own brokerage companies which exact from those who would trade with it an additional sum of two million dollars per annum (year 1934) over and above the secret and confidential allowances and rebates received by it (See Report of Special Committee of the House of Representatives referred to previously) • • • Independent units and small chains cannot and do not obtain similar brokerage commissions.

(c) In addition to these special benefits amounting to $8,105,000 the sheer weight of the enormous purchasing power of the Great Atlantic & Pacific Tea Company places it in a buying position vastly more favorable than that of independent units and small chains. It is with difficulty that the tremendous purchasing power of this chain and others similiarly situated can be visualized. It will, however, suffice to point out the size of some of its purchases:

1. Purchased 210 million pounds of butter. (calendar year 1934).

2. Purchased seven million five hundred thousand hens. (calendar year 1934).

3. Other purchases made on equally grand scale.

The advantage- gained as a consequence of this great purchasing power manifest themselves in many ways and cause

the operations of the great chains such as the Great Atlantic & Pacific Tea Company to differ basically from those of the small chain, the local wholesaler and independent retailer. The following illustration will serve to indicate one of the many benefits which flow from such a large purchasing power as is possessed by the Great Atlantic & Pacific Tea Company [fol. 248] and other similarly situated chains.

Illustration:

A canner having a surplus of, let us say, ten thousand cases of canned goods would and will sell this block of merchandise in its entirety to one of the great chains such as the Great Atlantic & Pacific Tea Company for a measurably lesser figure than he would to the local wholesaler, the independent retailer or a chain the size of the H. G. Hill Stores, whose requirements would only permit the purchase of only a portion of the canner's surplus stock, say five hundred or one thousand cases. This is true because the canner by selling the entire surplus is enabled to immediately release the monies which he has tied up in this merchandise and also eliminate all further sales expense and effort.

(d) The operations of the Great Atlantic & Pacific Tea Company and other large chains are nationwide in scope, extending even into the Dominion of Canada. As a result of this broad geographical spread, the Great Atlantic & Pacific Tea Company is not dependent upon the prosperity or lack of prosperity of isolated communities. The insurance and safety afforded by this geographical spread cannot be enjoyed by small chains or independent units.

(e) The nationwide scope of the Great Atlantic & Pacific Tea Company, and to a lesser extent, certain other large chains permit- the use of national advertising, particularly radio broadcasts on chain hookups and the employment of talent of the highest caliber, the cost of which would be prohibitive to the small chain and the wholesale grocer or the independent merchant. It is further to be noted that the advertising of the Great Atlantic & Pacific Tea Company for several years was conducted without cost to the Company, they having received the equivalent of their ad- [fol. 249] vertising expenditures in the form of secret rebates and allowances. (See special Investigation, American Retail Federation, House of Representatives, page —).

(f) The Great Atlantic & Pacific Tea Company's size and great purchasing power permits the organization of a buying department having twelve (12) field offices dotted throughout the country, each located at the primary markets for the important commodities and items which it purchases.

(1) Each field office is in charge of a specialist and these offices are supervised by the Company's central purchasing department in New York, which co-ordinates their activities. The field offices are, as pointed out above, located in the principal center of production and primary markets for the commodities which the Company requires. Illustrative of this is the fact that the California purchasing office buys all of the canned fruits and canned fish; most of the supply of these products for the United States being packed in the geographical area. The Louisiana office purchases the entire rice requirement for the entire chain as the market for this commodity is located in the State of Louisiana. Similarly, the Chicago office which is located in the heart of the section where peas and corn are canned, likewise purchase- the chain's entire requirement of these articles. The other field buying offices are located to equal advantage for the products that they buy.

(2) The cost of this plan of operation would be prohibitive to any company or companies unless they be possessed of purchasing power such as that which The Great Atlantic & Pacific Tea Company possesses or at lease vastly greater than that which is possessed by small local units not nationwide in scope. This scheme of operation results further in the Great Atlantic & Pacific Tea Company being able to keep more closely attuned to the prices and supply of the commodities which it requires and to build up statistical [fol. 250] data and information as to the markets and market conditions, which would be prohibitive to small chains, local wholesalers and the independent retailer.

(g) Enormous purchasing power permits The Great Atlantic & Pacific Tea Company and other large chains to manufacture and can many of the articles which they sell at retail. This results in an intergrated operation which places the large chain in a different situation from that of the small chain, local wholesaler or independent retailer. By manufacturing a substantial portion of its requirements

it can convert into a profit many of the costs (manufacturer's profit, sales expenses, etc.) which are passed on to the small chain, local wholesaler or independent retailer. The importance of the manufacturing activities of the Great Atlantic & Pacific Tea Company can be better judged when it is realized that they manufacture:

80,000 tins of salmon daily, 2,000,00- pounds of bread daily, 500,000 cans of evaporated milk daily, 72,000 jams and preserves daily, and innumerable other articles on a similarly grant scale.

One of the many benefits derived from these manufacturing activities can be illustrated, at least in part, in the following fashion:

A large chain such as the Great Atlantic & Pacific Tea Company can operate and use the entire output of a plant operated for the purpose of canning evaporated and condensed milk. This plant can be operated on a competitive basis with those which exist in other canneries of evaporated or condensed milk. On the contrary, a chain the size of the H. G. Hill Stores or the largest wholesale grocer in New Orleans could — profitably maintain a similar can- [fol. 251] ning plant since its total requirements would be insufficient to admit of the operations of such a cannery, on competitive price basis as its requirements would be too limited. The same illustration holds with equal force insofar as other items such as peas, corn, salmon, condiments, ketchup, jams, preserves and many other items are concerned, from which it can be seen that the Great Atlantic & Pacific Tea Company or other large chains are enabled to profitably take the entire output of a factory owned and operated by them and thereby secure not only the manufacturing profit but eliminate the selling costs. The small chains as the H. G. Hill Stores or other local wholesalers or independent retailers would have to pay the manufacturer's selling costs to the manufacturer or canner from whom they purchase these competitive items. These manufacturing profits and selling costs are considerable and would result in their having to pay a price different from that which would be paid by the Great Atlantic & Pacific Tea Company and other large chains, for similar articles.

(h) The Great Atlantic & Pacific Tea Company through its wholly owned subsidiary, The American Coffee Cor-

poration, is the largest coffee merchant in the world. It purchases its own coffee in South America, imports it, roasts it and sells it itself. It has offices and agents in Columbia contacting planters and supervising crops in Brazil. For these reasons The Great Atlantic & Pacific Tea Company is able to sell coffee for measuarbly lower prices than it would be possible for independents or small chains. Only [fol. 252] the sales volume of The Great Atlantic & Pacific Tea Company permits the profitable operation of its coffee subsidiary, The American Coffee Corporation. No small chain or independent unit could operate a subsidiary coffee corporation of this type of purchase coffee on the same basis as the Great Atlantic & Pacific Tea Company can as a result of its ownership and operation of the American Coffee Corporation. This assumes great importance inasmuch as coffee has long been recognized as one of the best grocery leaders and the value of this coffee subsidiary is reflected not only in the coffee purchases but also in the purchase of other grocery items.

(i) The effect of these advantages on the profits of large chains having enormous purchasing power and doing a tremendous volume of business throughout the country is best illustrated by the photostatic copies of tables which are appended hereto and made a part hereof. These tables are found in Senate Document No. 97, 73rd Congress, 2nd Session, Brochure, Chain Stores Invested Capital and Rates of Return of Retail Chains, and represent comparisons of results obtained by small retail grocery chains and those of great magnitude. They prove conclusively that when a retail grocery chain possesses more than one thousand units it has, in the main, double the profit possibility possessed by small chains or independent grocery units and they also show that the investment per unit diminishes in accordance with the size of the chain and that chains possessing more than one thousand units have a materially smaller investment per unit than those of small chains.

(j) The large chains make it a fundamental rule of operating policy to acquire little, if any, real estate in the [fol. 253] communities in which they are doing business. Your affiant is informed and believes that the Great Atlantic & Pacific Tea Company does not own a single piece of real property in the State of Louisiana, not even its warehouse whereas the H. G. Hill Stores, Inc. have sub-

stantial sums invested in real estate as do virtually all of the independent retailers and wholesale jobbers operating in this area.

Affiant further declares that the foregoing is not designated to be a compendium of all of the vast differences that exist between operations of the type of the Great Atlantic & Pacific Tea Company and that of a chain having an infinitesimal number of units, by comparison with that of the Great Atlantic & Pacific Tea Company.

Affiant declares that there are numerous other differentiating factors but believes that the foregoing suffices to show that any comparison of the operations of the Great Atlantic & Pacific Tea Company with that of a small chain is inaccurate, misleading and unfair unless the foregoing factors be taken into consideration.

(Sgd.) W. E. Penick.

Sworn to and subscribed before me this 23rd day of November, 1935, A. D. Joseph Jones, Notary Public. (Seal.)

Table 49.—Rates of return on business investment, by kind and size of chain, all years combined

Kind of chain	Number of stores per chain								All groups combined
	2-5	6-10	11-25	26-50	51-100	101-500	501-1,000	1,001 and over	
Upward trend:									
Gro. & meat	10.68	11.86	10.89	11.30	14.14	11.39	11.99	24.60	21.56
Var. ($1 limit)	6.72	13.60	17.45	16.48	11.69	18.32	18.17	26.69	21.11
D. G. & apparel	9.36	12.23	13.48	−.29	7.39	45.37	30.59	17.71	20.35
W. r'dy-to-wear	11.04	17.66	12.73	47.00	25.92	16.36	.....	.....	16.46
Millinery	22.07	13.65	23.10	24.15	40.62	28.55	.....	.....	27.89
W. shoes	5.35	8.00	22.28	9.15	48.05	47.03	.....	.....	17.75
M. r'dy-to-wear	10.47	2.73	2.83	10.81	.....	.....	.....	.....	5.61
Mus. inst'm'ts	1.98	−3.40	4.46	7.97	.....	.....	.....	.....	4.98
Gen'l mdse	5.58	6.80	14.07	.....	.....	.....	.....	.....	7.80
Downward trend: [1]									
Meat	22.90	9.59	19.95	21.90	12.48	.30	.....	.....	16.61
Dept. store	12.75	7.75	6.81	6.33	.....	19.18	−2.09	.....	9.82
Var. ($5 limit)	8.31	15.24	7.87	13.76	−.59	.....	.....	.....	9.40
M. & W. r'dy-to-wear	10.04	10.91	11.70	8.74	4.48	.....	.....	.....	9.71
Var. (unlimited)	8.33	9.72	6.10	−12.86	.....	.....	.....	.....	.75
Hats & caps	8.06	.....	−.65	−6.65	2.94	.....	.....	.....	−.62
Dry goods	5.66	.43	4.77	−9.89	.....	.....	.....	.....	1.58
Indeterminate trend: [1]									
Grocery	17.01	12.26	9.94	12.15	11.30	16.60	11.70	11.43	12.83
Drug	8.87	14.12	16.30	15.37	11.82	12.74	6.10	.....	11.73
Tobacco	8.86	5.51	8.66	11.33	10.78	14.82	.....	9.08	10.20
Confectionery	9.51	13.81	14.69	11.19	−1.67	35.47	.....	.....	10.14
M. & W. shoes	13.91	5.46	7.71	9.74	3.01	14.64	.....	.....	10.15
M. shoes	7.79	25.87	30.77	25.68	10.65	.....	.....	.....	18.60
Hardware	5.92	6.22	.90	.78	9.22	.....	.....	.....	3.51
M. furnishings	4.50	15.71	−3.14	5.57	.....	.....	.....	.....	3.09
W. accessories	22.78	17.70	10.18	25.73	.....	.....	.....	.....	15.95
Furniture	7.78	10.41	6.90	8.84	.....	.....	.....	.....	8.02
All kinds of chains combined	11.39	8.85	9.00	9.16	9.83	17.20	14.22	22.70	14.88

Table 53.—Rates of return on total investment by kind and size of chain, all years combined

Kind of chain	Number of stores per chain								All groups combined
	2–5	6–10	11–25	26–50	51–100	101–500	501–1,000	1,001 and over	
Upward trend: [1]									
Gro. & meat	10.47	11.57	10.75	11.14	13.55	10.78	11.86	22.58	20.05
Var. ($1 limit)	6.03	13.55	17.08	15.79	10.46	17.77	17.86	27.27	21.19
D. G. & apparel	8.92	11.90	13.29	−.24	7.39	33.99	28.48	17.93	19.50
W. r'dy-to-wear	10.36	13.74	11.88	46.35	25.56	16.26	.....	.....	14.04
Millinery	16.76	9.79	18.81	19.13	29.73	17.12	.....	.....	19.18
W. shoes	5.06	7.47	20.26	9.02	36.59	32.96	.....	.....	16.24
Mus. inst'm'ts	1.79	−3.31	4.36	7.96	.....	.....	.....	.....	4.91
Gen'l mdse	5.85	6.81	13.93	.....	.....	.....	.....	.....	7.84
Downward trend: [1]									
Meat	22.11	9.30	19.55	20.47	11.55	2.25	.....	.....	15.56
Dept. store	11.72	7.66	6.17	6.21	.....	19.17	−2.09	.....	9.44
M. & W. r'dy-to-wear	9.32	10.45	11.35	7.89	4.51	.....	.....	.....	8.97
Var. (unlimited)	8.33	9.69	6.10	−12.17	.....	.....	.....	.....	.73
Hats & caps	7.66	.....	−.57	−6.57	3.60	.....	.....	.....	.05
Dry goods	5.56	.42	4.97	−9.65	.....	.....	.....	.....	1.76
Indeterminate trend: [1]									
Grocery	15.16	11.87	9.83	11.95	11.01	15.90	11.37	11.28	12.45
Drug	8.52	13.70	15.50	14.26	11.60	12.34	5.98	.....	11.36
Tobacco	8.05	5.23	8.49	11.26	10.63	8.70	.....	8.22	8.38
Confectionery	9.57	13.28	14.13	9.30	−.69	27.75	.....	.....	8.99
M. & W. shoes	12.65	5.28	7.45	9.49	2.99	14.00	.....	.....	9.72
Var. ($5 limit)	7.68	15.23	7.81	13.65	−.59	.....	.....	.....	9.19
M. shoes	7.45	21.82	30.69	25.68	10.65	.....	.....	.....	17.51
Hardware	5.16	6.87	1.53	.91	9.17	.....	.....	.....	3.44
M. r'dy-to-wear	8.70	3.13	2.84	10.62	.....	.....	.....	.....	5.15
M. furnishings	4.35	15.40	−2.45	5.56	.....	.....	.....	.....	3.17
W. accessories	22.52	17.65	9.42	25.51	.....	.....	.....	.....	15.04
Furniture	7.56	9.92	6.86	8.84	.....	.....	.....	.....	7.83
All kinds of chains combined	**10.54**	**8.49**	**8.57**	**8.64**	**9.26**	**15.88**	**13.54**	**21.14**	**14.13**

Table 31.—Stockholders' income per company, by kind and size of chain, all years combined

Kind of chain	Number of stores per chain								
	2–5	6–10	11–25	26–50	51–100	101–500	501–1,000	1,001 and over	All groups combined
Upward trend: [1]									
Grocery	$5,575	$7,531	$12,787	$27,713	$63,745	$244,353	$546,595	$1,262,727	$104,817
Gro. & meat	8,470	22,237	17,597	44,495	69,273	217,070	900,083	9,599,913	486,763
Var. ($1 limit)	6,575	16,384	98,177	207,259	427,204	3,668,434	11,818,640	30,623,471	1,395,581
D. G. & apparel	17,612	25,804	66,842	−11,324	57,871	3,360,844	10,333,097	11,864,224	197,655
Drug	5,934	28,067	83,640	167,362	465,930	1,579,529	1,578,533		71,480
Tobacco	1,810	2,650	7,545	45,384	20,907	1,583,218		3,850,109	247,641
Confectionery	13,698	118,927	184,309	515,513	−40,944	460,017			174,159
W. r'dy-to-wear	15,110	205,156	88,014	205,960	340,480	768,096			76,773
Millinery	5,929	6,136	18,096	29,949	179,008	422,504			38,691
W. shoes	4,228	5,949	95,259	58,704	284,901	344,391			41,972
M. & W. shoes	23,246	8,442	21,661	59,420	63,543	516,206			38,012
M. & W. r'dy-to-wear	25,559	53,324	75,530	90,729	110,868				47,023
M. furnishings	2,522	13,534	−5,968	23,073					2,446
W. accessories	8,579	14,470	13,736	56,542					14,524
Furniture	67,059	336,334	338,047	255,064					113,865
Mus. inst'm'ts	1,799	−25,737	107,930	598,337					72,408
Gen'l mdse	8,418	14,804	109,536						16,915
Downward trend: [1]									
Var. (unlimited)	2,795	12,544	10,450	−107,114					−2,355
Dry goods	1,684	551	31,044	−131,257					890
Indeterminate trend: [1]									
Meat	5,811	5,652	23,029	109,677	185,379	2,892			25,740
Dept. store	929,793	2,153,469	849,307	1,383,058		7,614,875	−4,774,422		1,349,285
Var. ($5 limit)	4,285	14,347	17,089	54,318	−9,895				11,435
M. shoes	8,743	61,770	70,404	69,662	45,778				37,541
Hardware	5,602	18,030	−6,226	−49,239	288,364				6,596
M. r'dy-to-wear	21,095	15,378	7,544	24,628					18,445
Hats & caps	3,339		−8,435	−43,951	28,892				−5,504
All kinds of chains combined	45,721	89,513	62,971	117,735	137,008	1,196,934	2,085,617	10,290,175	222,181

[1] See footnote 26, p. C6.

Invested Capital and Rates of Return of Retail Chains

Table 35.—Rates of return on stockholders' total and business investment, by size of chain, by years, all kinds of chains combined

Year	Number of stores per chain: 1–5	6–10	11–25	26–50	51–100	101–500	501–1,000	1,001 and over	Average
Stockholders:									
1913	15.46	17.96	15.93	30.96	19.54	13.80	30.70	.....	23.21
1919	32.01	25.06	23.60	23.82	35.81	28.80	14.64	35.55	30.32
1922	21.97	13.75	18.92	9.94	18.72	29.06	15.47	30.71	23.91
1925	15.65	13.29	13.47	13.21	18.91	22.82	21.10	27.45	19.59
1927	12.40	10.24	13.75	10.23	12.32	18.76	23.15	24.55	17.39
1928	11.23	9.96	8.44	14.32	10.84	21.35	22.27	23.05	17.19
1929	9.61	9.18	9.02	7.88	7.93	14.80	17.22	21.15	14.60
1930	3.28	3.95	.47	3.67	−4.12	11.01	6.21	17.88	9.33
Average	11.52	9.29	9.15	9.09	9.93	18.28	15.44	22.56	15.73
Total:									
1913	13.59	15.49	13.80	24.96	16.31	12.56	28.85	.....	20.67
1919	29.93	22.41	21.32	19.24	27.60	26.39	12.76	30.81	26.94
1922	19.05	12.95	16.63	9.15	15.98	26.25	13.33	29.50	21.90
1925	14.36	11.66	12.02	11.85	17.10	19.75	19.11	25.53	17.46
1927	11.31	9.14	12.22	9.55	11.28	16.28	21.32	22.81	15.48
1928	10.11	9.00	7.98	13.54	9.97	18.62	20.31	21.77	15.37
1929	8.89	8.35	8.48	7.59	7.79	12.65	16.34	19.75	13.13
1930	3.76	4.40	1.79	3.95	−2.11	9.93	6.16	16.93	8.74
Average	10.54	8.49	8.57	8.64	9.26	15.88	13.84	21.14	14.13
Business:									
1913	14.01	15.53	13.86	25.31	16.40	12.57	28.52	.....	20.67
1919	33.99	23.89	21.88	20.81	30.49	28.82	12.81	31.25	28.70
1922	20.98	13.00	17.27	9.48	16.42	29.30	13.47	30.89	23.17
1925	14.98	12.21	12.53	12.29	17.75	21.61	21.08	26.15	18.29
1927	12.15	9.58	12.77	9.89	12.09	17.93	22.85	24.51	16.38
1928	11.00	9.37	8.39	14.12	10.51	20.33	20.50	23.77	16.30
1929	9.80	8.78	8.98	8.09	8.36	13.29	16.95	21.07	13.77
1930	3.86	4.51	1.89	4.07	−2.74	10.45	6.22	18.31	8.96
Average	11.39	8.85	9.09	9.16	9.83	17.20	14.22	22.70	14.88

Table 39.—Average business investment per store, by kind and four sizes of chains, all years combined

Kind of chain	Number of stores per chain				All groups combined
	2–10	11–50	51–500	501 and over	
Upward trend: [1]					
Drug	$25,514	$31,936	$55,542	$51,280	$44,565
Tobacco	6,691	7,661	23,996	26,753	23,718
Var. ($1 limit)	22,297	36,646	96,199	72,391	76,547
Meat	7,640	10,819	16,481	.....	11,334
Hats & caps	15,215	16,529	16,204	.....	16,323
Millinery	6,044	4,084	6,597	.....	5,547
Hardware	50,543	87,328	75,873	.....	67,255
Downward trend: [1]					
Gro. & meat	26,085	11,841	8,606	7,266	7,659
Dept. store	3,003,622	989,729	170,963	179,994	830,213
Confectionery	81,768	104,239	37,628	.....	74,026
Var. ($5 limit)	13,737	14,424	10,966	.....	13,791
W. r'dy-to-wear	94,391	40,926	22,825	.....	57,022
M. & W. r'dy-to-wear	75,196	27,906	30,678	.....	44,246
M. shoes	30,473	10,132	8,924	.....	14,964
W. shoes	22,796	25,275	7,418	.....	19,335
M. & W. shoes	38,925	19,395	19,019	.....	22,998
Indeterminate trend: [1]					
Grocery	9,067	6,952	7,757	8,114	7,930
D. G. & apparel	47,221	26,627	26,656	47,023	42,633
Var. (unlimited)	15,058	17,628	.....	.....	16,705
M. r'dy-to-wear	80,141	28,155	.....	.....	66,336
M. furnishings	15,534	11,540	.....	.....	13,367
W. accessories	11,200	8,643	.....	.....	9,363
Dry goods	11,634	52,942	.....	.....	38,044
Gen'l mdse	42,265	57,709	.....	.....	44,802
Furniture	315,490	314,595	.....	.....	315,156
Mus. inst'm'ts	112,293	217,647	.....	.....	187,166
All kinds of chains combined	140,197	44,132	30,263	14,065	27,157

Invested Capital and Rates of Return of Retail Chains

Table 55.—Rates of return on stockholders' investment, by kind and size of chain, all years combined

Kind of chain	Number of stores per chain								All groups combined
	2–5	6–10	11–25	26–50	51–100	101–500	501–1,000	1,001 and over	
Upward trend: [1]									
Gro. & meat	12.00	12.69	12.36	12.48	15.18	11.63	12.50	23.18	20.98
Var. ($1 limit)	6.02	14.69	19.10	17.90	11.78	20.10	19.73	27.98	23.09
D. G. & apparel	9.55	13.17	14.23	−1.50	7.50	35.55	30.57	19.08	21.10
W. r'dy-to-wear	11.48	15.73	12.75	46.35	27.79	17.59	.....	.....	15.78
W. shoes	4.83	8.42	23.07	9.76	39.20	32.96	.....	.....	18.45
Mus. inst'm'ts	.45	−8.02	4.06	8.20	.....	.....	.....	.....	4.73
Gen'l mdse	5.84	6.94	14.94	.....	.....	.....	.....	.....	8.25
Downward trend: [1]									
Meat	27.54	10.92	21.67	21.59	13.64	.43	.....	.....	17.73
Dept. store	12.93	8.30	6.96	6.24	.....	21.97	−9.02	.....	10.44
M. & W. r'dy-to-wear	10.33	11.06	12.30	8.19	4.61	.....	.....	.....	9.51
Var. (unlimited)	8.46	10.65	6.22	−25.39	.....	.....	.....	.....	−1.87
Hats & caps	8.02	.....	−2.12	−12.54	3.04	.....	.....	.....	−1.70
Dry goods	5.51	.42	4.62	−15.06	.....	.....	.....	.....	.43
Indeterminate trend: [1]									
Grocery	17.00	12.91	10.72	13.22	12.78	18.23	12.29	12.82	13.99
Drug	9.09	15.03	16.92	16.73	13.54	13.99	5.98	.....	12.63
Tobacco	8.25	5.16	9.19	12.73	12.01	11.32	.....	9.16	9.69
Confectionery	10.64	13.80	14.73	9.55	−1.11	27.75	.....	.....	9.22
Millinery	18.12	10.75	20.68	20.16	30.47	17.12	.....	.....	19.85
M. & W. shoes	13.63	5.11	7.69	9.76	2.80	14.29	.....	.....	10.12
Var. ($5 limit)	8.04	16.31	8.38	14.50	−2.14	.....	.....	.....	9.85
M. shoes	7.55	23.05	33.79	28.77	11.83	.....	.....	.....	18.93
Hardware	4.65	5.88	−1.90	−2.06	10.90	.....	.....	.....	2.06
M. r'dy-to-wear	9.33	2.19	1.92	14.82	.....	.....	.....	.....	4.96
M. furnishings	4.16	16.99	−3.86	5.51	.....	.....	.....	.....	2.72
W. accessories	25.16	18.90	10.10	30.19	.....	.....	.....	.....	16.75
Furniture	7.77	10.53	6.63	9.25	.....	.....	.....	.....	8.09
All kinds of chains combined	11.52	9.29	9.15	9.09	9.93	18.28	15.44	22.56	15.73

[1] See footnote 26, p. 66.

[fol. 256] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF W. E. PENICK—Filed May 28, 1935

STATE OF LOUISIANA,
Parish of Orleans:

Before me, the undersigned authority, a Notary Public, duly commissioned and qualified in and for the Parish and State aforesaid, personally came and appeared, W. E. Penick, who being duly sworn, deposes and says:

That he is Vice-President of H. G. Hill Stores, Inc., a duly organized Louisiana corporation, and that as such he is familiar with the allowances and discounts received by the H. G. Hill Stores, Inc.

Affiant further declares that he has read an affidavit signed by one, David T. Bofinger, executed before R. J. Schulze, Notary Public, Westchester County, State of New York, on January 2, 1936, wherein the said Bofinger states that he is of the opinion that the H. G. Hill Stores do receive "allowances and discounts as great as those received by the Great Atlantic & Pacific Tea Company on the great bulk of their purchases, if not on all of them." Affiant declares that this statement is erroneous and untrue. The allowances, rebates, discounts and special advantages reaped by the Great Atlantic & Pacific Tea Company are many times greater than those received by the H. G. Hill Stores when computed and compared on a per store basis, on the basis of dollar sales, in the aggregate, or on any other basis of comparison that may be used.

Affiant's information as to the special allowances, rebates, discounts and simulated brokerage profits of the Great Atlantic & Pacific Tea Company was obtained from the testimony adduced at the Congressional Investigation conducted during the months of June and July, 1935 and sometimes styled the Patman Investigation. At and during the course of this investigation, duly accredited representatives of the Great Atlantic & Pacific Tea Company testified and the record reveals with absolute certainty that this corporation (the Great Atlantic & Pacific Tea Company) did obtain special discounts, allowances, rebates and simulated brokerage profits in excess of the sum of eight million dollars and there was additional evidence to corroborate the fact that these were not all of the concessions received by

the Great Atlantic & Pacific Tea Company. The uncontroverted testimony further shows that the Great Atlantic & Pacific Tea Company, because of its tremendous purchasing power, stands in a class by itself and does receive quantity discounts which are unavailable to concerns of small statute such as the H. G. Hill Stores, Inc., which concern possesses but eighty-six (86) units as contrasted with the fifteen thousand two hundred (15,200) units contained in the [fol. 257] Great Atlantic & Pacific Tea Company chain. The effect of these discounts, allowances, rebates, etc. is to give a per store advantage many times greater than a concern such as the H. G. Hill Stores or any other similar company can possibly receive. In fact, on the basis of the Great Atlantic & Pacific Tea Company receiving an allowance of eight million dollars as a consequence of these concessions, special discounts, and brokerage fees, this sum gives to it a per store allowance of more than Five Hundred Dollars ($500.00) per unit for each and every one of the fifteen thousand two hundred (15,200) units embraced in its chain which is again many times more than the allowances and discounts applicable to the individual units of the H. G. Hill Stores. These concessions, rebates and brokerage fees when computed on the basis of dollar sales, give to the Great Atlantic & Pacific Tea Company again an advantage many times greater than that of the H. G. Hill Stores.

In addition to these concessions, rebates and brokerage fees, the Great Atlantic & Pacific Tea Company enjoys further advantages in that it manufactures many of the articles that it sells and reaps a further profit which is not available to the small units such as the H. G. Hill Stores, Inc.

(Sgd.) W. E. Penick.

Sworn to and subscribed before me this 16th day of March, 1936. (Sg.) Joseph Jones, Notary Public. (Seal.)

[fol. 258] In United States District Court

Affidavit of James D. Huck, Jr.—Filed May 28, 1935

United States of America,
State of Louisiana,
Parish of Orleans:

Before me, the undersigned authority, a Notary Public, duly commissioned and qualified in and for the Parish and

State aforesaid, this day personally came and appeared, James D. Huck, Jr., a resident of the City of New Orleans, Orleans Parish, Louisiana, to me personally known, who being first duly sworn, deposes and says:

My name is James D. Huck, Jr. I am a duly commissioned and registered certified Public Accountant in the State of Louisiana, and I am registered with the State Board of Certified Public Accountants of the State of Louisiana, assigned Number 454 by said Board, and I am in good standing. I am duly qualified to practice as a certified public accountant in the State of Louisiana, and I am a member of the Louisiana Society of Certified Public Accountants. I have had ten years experience in accounting.

I have carefully examined and studied the affidavits prepared by the Complainant and Interveners in the suit captioned The Great Atlantic & Pacific Tea Company, Plaintiff, vs. Alice Lee Grosjean, Supervisor of Public Accounts, and Gaston L. Porterie, Attorney General of the State of Louisiana, Defendants, said suit being Number 277 In Equity, now pending in the United States District Court for the Eastern District of Louisiana, New Orleans Division, for the purpose of completely and thoroughly analyzing the figures and statements presented in the re- [fol. 259] spective affidavits named hereinafter to determine what conclusions, from both a technical and practical standpoint, can be drawn from said statements and figures contained in said affidavits, and just how far said statements and figures warrant the Court in holding that the conclusions made by the Affiants in said affidavits are correct.

General Statement Applicable to All Affidavits

It will be noted from an inspection of the statements contained in the affidavits aforementioned, that the figures submitted are unnecessarily condensed, and that no details of the costs of the merchandise sold, or the operating expenses are shown. This manner of presentation precludes the study and analysis of the various costs which are the contributing factors to the net results. The statements are not presented in proper form consistent with the accepted methods of presentation based on sound accounting principles.

To secure, therefore, somewhat of a more specific set-up

of the corporations involved, and in order to analyze and compare the results of the operations arising in the State of Louisiana with those outside the State, it is necessary to review the State Income Tax returns filed by the various corporations with the Supervisor of Public Accounts of the State of Louisiana. The State Income Tax returns, referred to hereinafter, are subject to audit, and no examination of the taxpayers' books and records have been made as yet by the Auditing Division of the State Income Tax Department.

[fol. 260] Analysis of Each Affidavit

I will now analyze, from an accounting standpoint, each affidavit filed in the litigation above referred to.

Sears, Roebuck and Company

In the affidavit of the above chain store operator, sworn to and subscribed before Margaret T. Pointer, Notary Public, on the 11th day of May, 1935, by C. L. Schenk, Assistant Secretary, the following statement, listed below, is shown:

"Average Sales and Profits During the Fiscal Year Ending January 29, 1935"

	Number of units	Average sales per store	Average profit per store	% of profit to sales
Mail Order Stores	10	$11,887,080	$859,700	7.23
"A" Stores	69	1,614,334	77,290	4.79
"B" Stores	295	262,409	15,526	5.92
"C" Stores	54	76,123	6,148	8.08

From the above statement, I submit the following calculations, captioned "Schedule 1", and "Schedule 2", respectively, converting the averages to annual results for the fiscal year ending January 29, 1935:

Schedule 1

Conversion of Average Sales Per Store To Annual Sales

	Number of units		Average sales per store	(Product)—Sales for fiscal year ended 1-29-35
Mail Order Stores	10	x	$11,887,080	$118,870,800
"A" Stores	69	x	1,614,334	111,389,046
"B" Stores	295	x	[illegible]	77,410,685
"C" Stores	54	x	76,123	4,110,642
				$311,781,143

Schedule 2

Conversion of Average Profits Per Store To Annual Profits

	Number of units		Average profits per store	(Product)—Profit for fiscal year ended 1-29-35
Mail Order Stores	10	x	$859,700	$8,597,000
"A" Stores	69	x	77,290	5,333,010
"B" Stores	295	x	15,526	4,580,170
"C" Stores	54	x	6,148	331,992
Total				$18,842,172

[fol. 261] Sears, Roebuck and Company

On page 1, line 1, of the corporation's state Income Tax Return, for the fiscal year ended January 31, 1935, filed with the Supervisor of Public Accounts, Baton Rouge, La., and sworn to and subscribed before Margaret I. Pointer, Notary Public, on the 26th day of November, 1935, by C. L. Schenk, Assistant Secretary, the gross sales reported amount to $307,018,957.35. The net profit for the year, as shown by the books, before any adjustments are made therein, shown on page three of return, Schedule L, line 7, amounts to $15,020,550.87.

The following statement marked Schedule 3, reflects the difference existing between the sales and profits reported on the Tax Return and the Sales and Profits reported in the affidavit:

Schedule 3

	Sales	Profits
Affidavit, (Schedule 1)	$311,781,143.00	$18,842,172.00
Tax Return	307,018,957.35	15,020,550.87
Difference	$4,762,185.65	$3,821,621.13

Both, the figures reported in the affidavit, and the figures reported in the tax return cover the same period. Both were filed under oath, and sworn to by the same official of the corporation, Mr. C. L. Schenk, Assistant Secretary. It now appears that either the sales and profits reported in the affidavit, dated May 11, 1935, are correct, and those reported in the State Income Tax Return are incorrect, or vice-versa. In either case, one department or other of the State of Louisiana has been supplied with erroneous information.

The following statements appearing on page two of affidavit represents the sales and profits and/or losses of the Louisiana Stores for fiscal years ending in 1932 to 1935

inclusive, losses being indicated by underscored figures in brackets, of the Louisiana stores:

Sales

	1932	1933	1934	1935
Alexandria	108,950	113,816	132,680	167,419
Baton Rouge				68,691
New Orleans	3,140,968	2,260,389	2,148,212	2,667,588
Shreveport	1,004,352	786,866	765,869	931,369
Total	4,254,270	3,161,071	3,046,761	3,835,067
Average	1,418,090	1,053,357	1,015,587	958,767

Profits or Losses

	1932	1933	1934	1935
Alexandria	(6,112) Loss	(12,194) Loss	1,199	9,469
Baton Rouge				(2,359) Loss
New Orleans	(157,002) Loss	(275,650) Loss	(138,412) Loss	(42,444) Loss
Shreveport	(73,385) Loss	(78,551) Loss	(36,834) Loss	618
Total	($236,499) Loss	($366,395) Loss	(174,047) Loss	(34,716) Loss

[fol. 262] Sears, Roebuck and Company

Average	($78,833) Loss	($122,133) Loss	($58,016) Loss	($8,679) Loss
Pertentage of Loss to Sales	5.56	11.60	5.71	0.91

In the foregoing statement of Profit or Losses, only net results are reported in absence of the details to show the tie in with the sales their relative merit cannot be passed upon.

The corporation's Tax Return for the fiscal year ended January 31, 1935, has been filed as a Foreign Corporation, and the Income derived from sources in Louisiana has been apportioned from the corporation's total operations of the entire chain. In absence of figures showing a separate accounting for Louisiana operations, no tie in with the Losses reported for the Louisiana stores, through this source is possible.

The following revenue appears on page one of the state Income Tax Return, for the entire chain, on the lines indicated by the number to the left:

7. Interest on Losses, Notes, Mortgages, etc.	$3,973,792.91
8. Rents	3,001,137.08
11. Dividends of Stock of Corporations	254,826.42
12. Other Income	1,484,933.28
Total	$8,714,689.69

From the character and source of the above income it would appear that the same was not acquired or earned as a direct result of stores' operations. If this amount of income were eliminated from the total income of $15,020,550.87, the difference, or $6,305,861.18 would remain as being earned by the entire chain, as a result of direct operations. The average percentage of profit to sales all over the country would be 2.05% instead of 6.39% as stated by the affiant on page 3, line 7. No doubt, some share of the expenses should be charged against this revenue of $8,714,689.69, which would be, probably in the nature of General and Administrative overhead, and comparatively nominal, as there is no information available for such proration of expenses applicable to these revenues, no attempt has been made to apportion any.

It becomes apparent, in absence of more detailed information, that this revenue was not earned as a direct result of merchandising chain stores. As only sales and profits or losses are shown in the affidavit with respect to Louisiana operations, it seems to follow that none of this extraneous revenue has been credited to Louisiana stores in the preparation of the results set forth as arising within the State of Louisiana.

[fol. 263] Wohl Shoe Company

In the affidavit of the above chain store operator, sworn to and subscribed before Richard H. Knight, Notary Public, on May 11, 1935, by its Vice-President, Mr. William H. Schields, the following statements, listed below, are shown:

Entire Corporation

	1932	1933	1934
Gross Sales	$6,588,808.66	$8,291,117.72	$11,126,242.19
Expenses	6,262,195.86	7,892,509.66	10,574,687.03
Earnings	326,612.80	398,608.06	551,555.16
Earnings on Sales	.0496	.0481	.0490
Values (Total Assets)	1,598,145.68	1,947,184.80	2,469,551.32
Earnings on values	.2044	.2047	.2233

State of Louisiana

	1932	1933	1934
Gross Sales	$125,107.82	$149,250.38	$336,045.18
Expenses	127,818.37	149,524.52	330,281.59
Earnings	2,710.55x	274.14x	5,763.59
Earnings on Sales	.0217x	.0018x	.0172
Values (Total Assets)	3,470.66	12,522.47	16,241.88
Earnings on Values	.7810x	.0219x	.0355

NOTE.—x indicates Loss.

From the above statement of the corporation's operations within the State of Louisiana, the earnings for the year 1934 are shown to be $5,763.59, or .0172 per cent of the sales made in the departments located in Louisiana.

A statement of income and expenses within the State of Louisiana, as shown by the corporation's State Income Tax Return, for the calendar year 1934 is presented below:

Louisiana Operations—Schedule 26—Statement of Income and Expense

1. Gross Sales, Less Returns	$336,045.18
2. Merchandise Inventory 1-1-34	10,567.65
3. Merchandise purchased	231,152.11
4. Total (2 and 3)	241,719.76
5. Merchandise Inventory, 12-31-34	15,194.75
6. Cost of Sales (4 less 5)	226,525.01
7. Gross Profit on Sales (1 less 6)	109,520.17
8. Retail Operating Expenses:	
(a) Salaries	$38,027.66
(b) Rent	37,859.87
(c) Taxes	640.74
(d) Depreciation on Fixtures	1,921.86
(e) Other department expenses (schedule 24B)	20,825.63
10. Total Expense	99,275.76
11. Net Income	$10,244.41

[fol. 264] Wohl Shoe Company

Schedule 24B—Other Deductions (Other Department Expenses)

Freight, express and drayage	$6,089.65
Advertising	10,447.52
Postage	326.08
Printing and Stationery	52.94
Salesbooks	42.23
Telephone and telegraph	36.79

Insurance	534.13
Shipping material	220.91
Parcel Post	86.66
Findings	584.90
Delivery Expense	69.20
Signs, Cards and display equipment	1,205.24
Repairing shoes	291.59
Laundry	20.08
Miscellaneous	464.73
Stock boxes	352.98
	20,825.63

The following statement, captioned Schedule 1, reflects the difference existing between the Net Income, as reported on the Tax Return for the year 1934, and the net income (earnings) for the year 1934 as reported on page 2 of the affidavit.

Schedule 1

	Amount	% of Sales
Net Income, per Tax Return	$10,244.41	.0305
Net Income (Earnings) per affidavit	5,763.59	.0172
Difference	4,480.82	.0133

It follows, therefore, that the Louisiana Departments have done almost twice as well in net earnings, per tax return as the earnings submitted in the affidavit.

[fol. 265] W. T. Grant and Company

In the affidavit of the above chain store operator, sworn to and subscribed before Elise E. Goetz, Notary Public, on the 17th day of July, 1935, by R. W. Story, comptroller, the following figures for the fiscal year ended January 31, 1935, are taken from the statement annexed thereto:

Total Company

	Fiscal year ended 1-31-35
Sales	$85,069,611.91
Expenses (net)	82,542,925.07
Earnings	2,526,686.84
% to Sales	2.970
Total Assets	31,020,965.76
% Earnings to Total Assets	8.145

State of Louisiana

	Fiscal year ended 1-31-35
Sales	$1,246,167.20
Expenses (net)	1,226,357.79
Earnings	19,809.41
% to Sales	1.590
Total Assets:	
Specifically allocated	240,834.87
Pro-rated	130,915.37
Total	371,750.24
% Earnings to Total Assets	5.329

The corporation's State Income Tax Return for the fiscal year ended January 31, 1935, filed with the Supervisor of Public Accounts, Baton Rouge, Louisiana, shows a Taxable Net Income of $20,342.24, as compared with earnings reported as shown above in the amount of $19,809.41, a difference of $532.83. A large part of this difference, namely $335.56, is accounted for in Schedule L, on page three of the return, and is shown as an unallowable deduction. The followin gstatement is taken from the State Income Tax Return and represents operations in the State of Louisiana.

Gross Income

Net Sales		$1,246,167.20
Cost of Goods Sold:		
Inventory beginning of year	$100,724.96	
Merchandise bought for sale	$880,113.10	
Transportation Costs	44,926.95	
	1,025,765.01	
Less Inventory end of year	130,089.37	
		895,675.64
		350,491.56
Rents		3,125.00
Other Income		26,437.69
Total Income (Forward)		380,054.25

Deductions

Rent of business property	$94,931.36	
Repairs	1,737.24	
Taxes	31,451.48	
Depreciation	14,442.95	
Other Deductions:		
(a) Salaries and Wages	131,058.27	
(b) Miscellaneous—Schedule attached Net Income	86,090.71	
		359,712.01
		$20,342.24

[fol. 266] W. T. Grant and Company

Other Deductions

(b) Miscellaneous

1. Telephone and telegraph	$ 706.26
2. General Expense	2,577.02
3. Charity	150.00
4. Luncheon Expense	2,455.60
5. Travel Expense	1,352.37
6. Stationery and postage	2,319.28
7. Subscriptions and dues	216.61
8. Fixture Expense	2,711.93
9. Advertising	14,002.30
10. Light	13,276.73
11. Paper and twine	5,486.92
12. Misc. Real Estate Expense	2,332.02
13. Coal and heat	387.78
14. Insurance	6,909.49
15. General Administrative expense	31,206.40
	$86,090.71

The accounts numbered from No. 1 to No. 8 inclusive, shown under the caption of "Other Deductions" seem to be General and Administrative expense of the Louisiana stores. The General and administrative expense shown as account Number 15, seems to be a portion of the General Administrative expense of the home office pro-rated to the Louisiana operations.

The basis upon which such pro-ration was made is not known, but the apportioning or pro-ration of General and

Administrative expense on the ratio of sales is common practice and considered equitable. On the Federal Corporation Income Tax Return filed for the fiscal year, ended January 31, 1935, copy of which was filed attached to the State Income Tax Return, the General and Administrative expense of the chain, reported on line 25, (b) was shown to be $737,613.61. The following sales and percentages show that the Louisiana Stores have been charged about three times as much for General and Administrative Expense as the average applicable to the entire chain:

	Total Company	% to Sales	Louisiana	% to Sales
Sales	$85,069,611.91	100.000	$1,246,167.20	100.000
General and Administrative Expense	737,613.61	.867	31,206.40	2.504

A fair and equitable pro-ration would be: .00867 of $1,246,167.20 or $10,804.27. It now follows that the Louisiana operations have been overcharged by $20,402.13 ($31,206.40—$10,804.27). The profits of the Louisiana Store is adjusted, in the following:

Earnings, Louisiana, from page 1	$19,809.41
Add:	
Excess General and Administrative expense charged against Louisiana	20,402.13
	$40,211.54
Per cent of Sales	3.277%

It now results in the rate of percentage of earnings to sales of the Louisiana Stores, being shown at 3.227% instead of 1.590%. This percentage is above the average of the stores combined, which is 2.970% as shown in the affidavit.

The analysis of depreciation deducted as shown in Schedule I, of the State Income Tax Return, is shown below:

Schedule I

Explanation of Deduction for Depreciation

Furniture and Fixtures	$ 9,007.05
Amortization of Deferred charges	5,435.90
Total	$14,442.95

[fol. 267] W. T. Grant Company

The cost values of the assets depreciated are not shown in the schedule, (nor in the balance sheet), although the form does provide for same. It is not known, therefore, whether or not, this item of $14,442.95, deducted as expense representing depreciation, is a fair and reasonable allowance for the year's depreciation. The affidavit, however, shows assets specifically located within the State of Louisiana amounting to $240,834.87. The value of the merchandise inventories in the Tax Return is shown to be $130,089.37. The difference between the two should represent the value of the assets depreciated. This difference, ($240,834.87—$130,089.37) amounts to $110,745.50. A depreciation deduction of $14,442.95 does seem somewhat high, in view of the fact that usually 10% is taken on Furniture and Fixtures, and the like. Of the total depreciation charge, $5,435.90 is described as "amortization of Deferred Charges", but not explained.

[fol. 268] Scott-Burr Stores Corporation

In the affidavit of the above chain store operator, sworn to and subscribed before Gary Carlton, Notary Public, on the 13th day of July, 1935, by E. P. Tolley, assistant comptroller, the following summary of losses sustained by the Louisiana stores for the year 1934 are shown:

New Orleans Store lost	$915.00
Baton Rouge store lost	7,053.00
Alexandria Store lost	2,858.00
Total Loss	$10,826.00

The affiant states that in the same year all stores operated by the corporation made a total profit of $59,752.00.

The above figures reflect net results only. Neither the revenue nor the details of costs and expenses are furnished. The affiant is unnecessarily brief in his presentation of facts, so much so, that the figures should not merit any recognition.

From the figures submitted above the following calculation, marked schedule I, shows the profits of the Scott-Burr stores corporation arising from without the State of Louisiana.

Schedule I

Calculation of Profit on Stores Outside Louisiana

Loss in Louisiana stores	$10,826
Net Profit, all stores	59,752
Profit on stores outside of Louisiana	70,578

The above calculation is restated below, marked schedule 2, in order to determine the percentage of profit of the entire chain that was absorbed by the alleged losses sustained in the operation of the Louisiana stores.

Schedule 2		% of Total
Total Profits from Schedule 1	$70,578	100.00
Losses sustained in Louisiana	10,826	15.34
Net Profit all stores	59,752	84.66

From the above calculation it is shown that the operations in Louisiana cost the entire chain 15.34% of its profits.

The state income tax return filed by the Scott-Burr Stores Corporation for the same year, filed with the Supervisor of Public Accounts, State of Louisiana, shows for income tax purposes the following losses:

		% of total	Average per store
Loss per 1934 income Tax return, all stores	$221,264.15	100.00	1638.99
Net loss within the State of Louisiana (3 stores)	20,907.02	9.45	6969.00
Net loss outside Louisiana (132 stores)	200,357.13	90.55	1517.86

According to the figures submitted by the Scott-Burr Stores Corporation, the Louisiana Stores lost 15.34% of the total corporate earnings. From the state income tax return, for income tax purposes, all the stores suffered a [fol. 269] net loss of which Louisiana operations were responsible for 9.45% of the total loss.

Further analysis of the State Income Tax Return reveals the following:

		% to sales
All Stores		
Sales	$6,740,186.35	100.000%
General Expenses	50,007.63	.742%
Louisiana Stores		
Sales	192,007.53	100.000%
General Office overhead	11,664.34	6.075%

It now appears that the General Office Overhead or General Expenses charged against the Louisiana sales are out of all reasonable proportions. An equitable distribution of the General Expenses would be on the basis of sales. This manner of distribution is not only considered fair, but is common practice in apportioning of General Expenses. Under this method of treatment the portion of overhead chargeable against Louisiana stores would be .00742 applied against sales of $192,007.53 or $1,424.70; then, $11,664.34 minus $1,424.70 results in an excess of $10,239.64, by which the Louisiana income tax loss should be adjusted. The adjustment is given effect to in the calculation which follows:

Louisiana Loss	$20,907.02
Deduct Excess General Office Overhead	10,239.64
Adjusted Loss	$10,667.38
Average per store (3)	3,555.79

In conclusion it appears that all stores for income tax purposes sustained losses in 1934. The average loss per store (entire chain) was $1,638.99. The average loss per store on Louisiana operations after General Office Overhead adjustment was $3,555.79.

[fol. 270] G. R. Kinney Company, Inc.

In the affidavit of the above chain store operator, sworn to and subscribed before Marvin Arnold, Notary Public, on the 31st day of May, 1935, by Phoenix S. Franks, Vice-President, the following statement for the year 1934 is annexed thereto:

Entire Corporation

	1934
Gross Sales	$13,184,177.
Expenses	13,011,630.
Earnings	172.547
Earnings and Sales	.0131
Values	3,623,978
Earnings on Values	.0476

State of Louisiana

	1934
Gross Sales	$135,345
Expenses	135,670
Earnings	325x
Earnings on Sales	.0024x
Values	30,869
Earnings on Values	.0105x

x—Donotes red ink figures.

The following statement compares the sales as reported above for the entire corporation with the sales as reported on the State Income Tax Return, file- with the Supervisor of Public Accounts, Baton Rouge, Louisiana, for the year 1934.

	Entire Corporation
Sales, as reported in affidavit	$13,184,177.00
Sales, as reported on Tax Return	11,813,285.99
Difference in Sales	$1,370,891.01

The same figures, namely, $11,813,285.99, appear also on the Corporation's Federal Income Tax Return, (copy of which was attached to the State Income Tax, as required by Income Tax Laws of Louisiana) and are indicated to be both the Gross Sales and the Net Sales. There is a notation to the effect that the Return Sales are "not kept separately", on the Federal Income Tax Return. It, follows, therefore that this discrepancy of $1,370,891.01 existing between the Sales as reported in the affidavit and the Sales reported in the Income Tax Returns, is not due to return sales or allowances being deducted from Gross Sales in the one instance and not in the other.

The average earnings, per store, reported in the affidavit for the stores operated outside of Louisiana for the year 1934 are shown to be $502.00 profit per store. The average losses for the Louisiana Stores, per store, are shown to be $65.00 less per store. In the calculation which follows below, these averages are converted to the original amounts which were averaged:

Conversion of Average Profits and Losses to Original Profits and Losses for the Year 1934

	Entire Chain	Louisiana Stores
Average Profit or Loss per store	$502.	$65.*
Multiplied by number of stores	330	5
Profit, all stores	$165,660	
Loss, Louisiana Stores		$325.*

* Denotes Loss.

[fol. 271] The profits for the entire chain are shown to be $172,547, as reflected by the statement listed earlier in these comments on G. R. Kinney Company, Inc., but, the profits that were averaged, as shown above, amount to $165,660.

The following calculation comprises the two and shows the difference:

	Entire Chain Year 1934
Profit, page 4 of affidavit	$172,547
Profit, per averages as converted above	165,660
Difference	$6,887

The figures supplied by the affiant are at variance in two instances. The Sales for the entire chain and profits for the entire chain. With such discrepancies existing in such brief information, it would appear that such statements as furnished do not merit recognition or consideration at all.

[fol. 272] H. L. Green Company, Inc.

In the affidavit of the above chain store operator, sworn to and subscribed before Anne E. Bossler, Notary Public, on the 27th day of May, 1935, by R. D. Kittinger, Vice-President, the following statement, listed below, is contained therein:

Fiscal Year Ending January 1, 1935

	Entire Company	Louisiana
Gross Revenues	$26,824,127	$168,627
Cost of Merchandise and Operating Expenses	25,217,854	160,454
Net Earnings Before Federal Income Tax	1,606,273	8,173
Capital Invested	6,307,851	43,899
Percent Earned on Invested Capital	25.5%	18.6%

The affidavit states further: "The above figures (which are before deduction for Federal Income Taxes) shows that the average profit per store for the entire system in the year ending January 31, 1935 was $12,549, while the profit of the Louisiana Store in that year was $8,173.

The State Income Tax Return filed by H. L. Green Company, Inc., with the Supervisor of Public Accounts, for the fiscal year ended January 31, 1935, shows the operations within the State of Louisiana in detail, for Income Tax purposes. Attached to the State Return is a copy of the Federal Income Tax Return which shows in detail the operations of the entire chain for Income Tax purposes. A comparison of the Sales, and Gross Profits, from the tax returns is made in the following statement:

Fiscal Year Ended January 31, 1935

	Entire Corporation	Louisiana Store
Sales	$29,197,515.84	$166,472.84
Cost of Goods sold, Line 2, (e)	20,120,741.23	115,780.01
Gross Profit on Sales	9,076,774.61	50,692.83
Per cent of Gross Profit to Sales	31.08%	30.45%
Excess of Entire Corporation per cent over Louisiana Store		.63%

The above comparison reflects first as to sales; that, the sales on the Income Tax Returns differ from the gross revenues reported in the affidavit. The difference is shown below:

	Entire Corporation	La. Store
Gross Revenues, per affidavit	$26,824,127.00	$168,627.00
Sales, per income tax returns	29,197,515.84	166,472.84
Difference, excess over return		2,154.16
Difference, excess under return	2,373,388.84	

The difference of $2,154.16, on the Louisiana figures, seems to be accounted for, in that this amount is shown as "Other Income" on the Income Tax Return. The differ-

ence on the entire corporation, in the reverse order, from the data examined, is unaccounted for.

The above statement of comparison of Sales and Gross Profits further indicates that the Gross Profit earned by the Louisiana Store is only under the average by .0063%. It is likely that this difference is caused by higher trans- [fol. 273] portation costs on the merchandise shipped to Louisiana, because of the distance from the Eastern Markets. Most of the stores operated in the chain are located, (per Exhibit A, attached to affidavit) nearer to markets. Aside from this the gross earnings of the Louisiana Store would appear to be as uniform as to the average.

On the Federal Income Tax Return, there is shown $703,-393.04 as other income, credited to the entire chain operations. An analysis of the same is presented below:

Other Income—Schedule 13

Income from Concessions	$466,113.73
Discount on purchases	189,696.90
Management Fee Subsidiary Co.	5,379.38
Profit realized on Claims purchased against Isaac Silver & Bros. Co. Estate	22,041.09
Collection on accounts Received purchased carried at no value on books	8,041.87
Miscellaneous	2,971.52
Profit on merchandise in stores closed and burned	9,148.55
	$703,393.04

Of the above, other Income, the Louisiana operations, do not seem to be credited with any of the Discount on Purchases, or any of the other items of revenue applying to the whole chain, as being general in nature, and not applying directly to stores' operations. For this reason, it would appear that a more equitable comparison of earnings would be on the basis of the Taxable Income of both, the Entire Chain and the Louisiana Store, before Federal Taxes are charged, and after eliminating the other Income from both

the Entire Chain Operations, and the Louisiana operations. This comparision follows in the statement listed below:

For Fiscal Year Ended January 31, 1935

	Entire Corporation	Louisiana Store
Taxable Income before Federal Taxes are paid (from Tax Return)	$1,616,704.34	$8,473.76
Less: Other Income	703,393.04	2,154.48
Profits arising through direct operations	$913,311.30	$6,319.28
Average per store	7,135.25	$6,319.28
Under average		815.97

A reasonable amount of the expenses are probably chargeable against the Income eliminated and some allowance might be made. But in absence of information of this character no adjustment can be made. The same would be, of course, nominal.

In conclusion, on the basis discussed above, the Louisiana earnings are shown to be under the average, of the stores operated in the entire chain by $815.97, instead of $4,376.00, ($12,549 minus $8,173) as originally claimed by affiant.

[fol. 274] Consolidated Millinery Company

In the affidavit of the above chain store operator, sworn to and subscribed before Mary R. Fitzgerald, Notary Public, on the 21st day of May, 1935, by James F. Stewart, assistant secretary, the following statement of percentages is shown:

In Louisiana

1932	Loss	.543
1933	Profit	.167
1934	Profit	.89

In Virginia

1932	Profit	2.532
1933	Profit	1.074
1934	Profit	2.354

In Alabama

1933	Profit	1.268
1934	Profit	2.705

In Georgia

1933	Profit	2.185
1934	Profit	2.445

In Mississippi

1932	Profit	.709
1933	Profit	4.311
1934	Profit	6.038

The above percentages represent net results only, and are so brief that, in so far as the operations of the chain are concerned, they do permit comparison. Such a presentation as shown above should not merit any recognition.

For income tax purposes, the Consolidated Millinery Company elected to file their 1934 state income tax return on the basis of "allocation of income derived partly within and partly without the state", as against the "separate accounting method", and through that method showed a taxable income for Louisiana operations of $5,808.90, as their state income tax return, filed with the Supervisor of Public Accounts, Baton Rouge, Louisiana, discloses. It is reasonable to assume that this method, for income tax purposes, must have been more advantageous to the corporation.

At least a taxable income of $5,808.90 would result in an average for the Louisiana stores of $1,161.78 as taxable earning per store.

The state income tax return reveals a total taxable income for the entire chain of $267,000.83, which results in an average taxable income per store of $1,230.42. The following statement compares the averages discussed in the foregoing paragraphs.

For the Year 1934

	All Stores	Louisiana Stores
Taxable income	$267,000.83	$5,808.90
Number of stores	217	5
Average taxable Income per store	$1,230.42	1,161,78

[fol. 275] F. W. Woolworth Co.

In the affidavit of the above chain operator, sworn to and subscribed before Paul Costello, Notary Public, on the 27th

day of May, 1935, by J. T. Leftwich, assistant-treasurer, the following statement, for the year 1934, is shown:

Entire Corporation

Gross Sales	$271,495,349.92
Expenses	249,816,611.06
Earnings	21,678,738.86
Earnings on Sales	.0798
Values	148,516,279.82
Earnings on Values	.1460

State of Louisiana

Gross Sales	2,021,878.30
Expenses	1,945,630.86
Earnings	76,247.44
Earnings on Sales	.0377
Values	617,891.30
Earnings on Values	.1234

The corporations' federal income tax returns for the operations in the United States shows the following revenue which, of its source and nature, does not seem to be earned as a direct result of stores' operation:

Interest on Loans, etc., Rents	$3,008,053.45	$3,478,973.18
Less: Real Estate Operations	704.012.89	2,304,040.56
Capital Gain		88,080.72
Total		5,871,094.46

The deduction made from rents appear among the deductions on the tax return, and it is presumed that this expense applies against the revenue of the same character. In presenting the results of the entire chain, in the absence of sufficient details showing the various costs, it appears that the revenue, aggregating $5,871,094.46 is included in the earnings of $21,678,738.86. The elimination of this item would put the earnings as shown for the Louisiana Stores on a more equitable basis for comparison. As far as can be learned from the details of the Louisiana State Income Tax Return, no revenue other than sales is included in the figures that comprise the operating results, as shown for Income Tax Purposes. The taxable income for the Louisiana Stores is, substantially, the same as the earnings sub-

mitted in the affidavit. The earnings for the entire corporation are adjusted in the calculation which follows:

	Entire Corporation
Earnings, year 1934	$21,678,738.56
Less: Interest, Rents, etc.	5,871.094.46
Adjusted Earnings	$15,807,644.10

On this basis, the percentage of entire corporation earnings would be 5.82% instead of 7.98%.

There is a charge made against the Louisiana Stores' operations for executive overhead of the main office amounting to $28,937.70. This charge figures $1.43% of the sales made in Louisiana. There is not sufficient information available to ascertain whether or not this amount is reasonable.

[fol. 276] Liggett Drug Company

In the examination of the affidavit of the chain store operator, sworn to and subscribed before R. W. Wolfe, Notary Public, on the 16th day of July, 1935, by L. O. Schuriat, Treasurer, no statements of operations are furnished. The affiant states that the percentage of earnings to sales in Louisiana was 2.96%. He states further that in the operations of the entire chain in some states this percentage was greater and in other states it was less.

Because of the failure of this chain store operator to include specific figures in regard to the operations conducted in Louisiana, and outside of Louisiana, no analysis is possible in this case.

Montgomery Ward and Company

In the affidavit filed by the above Chain Store Operator, sworn to and subscribed before T. R. Guidry, Notary Public, on the 18th day of July, 1935, by J. A. Donaldson, Assistant Comptroller, in so far as Sales and Expenses are concerned, mostly averages are reported.

In the absence of more complete details in the form of Income and Expenses, no report of consequence can be prepared from the information available on this corporation.

Great Atlantic and Pacific Tea Company

No figures are submitted on the Great Atlántic and Pacific Tea Company. Hence, there is no information that can be reported on.

[fol. 277] Tentative Form of Operating Statement, and Comments Regarding the Brevity and Manner of Presentation of the Statements Filed by the Chain Stores in Their Affidavits Discussed in the Preceding Pages.

Gross Sales	$	
Less: Returns and allowances		
Net Sales		$
Cost of Goods Sold:		
Inventory, beginning of year	$	
Purchases		
Freight, drayage and express		
Total		
Less: Inventory, end of period		
Gross Profit		$
Operating Expense:		
Advertising	$	
Salaries		
Commissions		
Delivery		
Sundry sales expense		
Store expenses		
General and administrative expenses		
Total		$
Operating Profit (or Loss)		$
Add:		
Other Income Credits:		
Discounts earned on purchases	$	
Miscellaneous revenue		
Total		$
Deduct:		
Other Income Charges:		
Discounts allowed	$	
Interest		
Miscellaneous		
Total		$
Net Income (or loss)		$

Cost of Goods Sold

From the statements submitted it is not possible to determine the cost of the merchandise sold, nor the gross profit on sales, and consequently no rate of percentage of gross profit can be calculated which would afford comparison and analysis.

It is generally the practice of chain store operators to invoice its branches for merchandise shipped to them at such a price as will allow a profit to the main office. This method of merchandising increases the cost of the goods sold by the branch, and reduces the gross profit of the branch stores; and reduces, ultimately, its net income or tends to create a loss.

[fol. 278] ___ Operating Expenses

Likewise, in the absence of complete details as to the operating expenses, no comparison or study of each of the expenses and their relation to sales is afforded. It is possible, that, in addition to charges for direct store expense, excessive charges for general and administrative expenses might be charged against the operations of a branch store. Such expenses might be as follows:

General and Administrative Expenses

1. Salaries of Officers.
2. Salaries of general office clerks.
3. Rent of general office.
4. Postage, stationery, and printing.
5. Telephone and telegraph.
6. Legal.
7. Professional accounting.
8. Directors' fees.
9. Traveling.
10. Corporation franchise and capital stock taxes.
11. Exchange (domestic) and collection charges.
12. Dues and subscriptions.
13. Contributions and donations.
14. Sundry office expense.
15. Miscellaneous.

Other Income Credits

It has been known that in the case of discounts, earned on merchandise purchased for shipment to branch stores that

such income is not always credited to the branch store accounts, but taken into the accounts of the main office. Such discounts might run upward into thousands of dollars during the course of a single year.

Other Income Charges

Interest on the capital invested within the state might possibly be charged against a branch store, or other financial charges might be excessively pro-rated with a view of minimizing the net income or create a loss.

General

It frequently occurs in department store merchandising, that a portion of the floor space is leased out to other chain stores, who specialize in certain retail fields, such as Shoes, Millinery, Underwear and Hosiery, and the like, for a consideration based on the sales of the lessee department. Whether or not this situation exists among any of the Chains involved, it is not known, or how such revenue earned by the lessor was handled; that is, if the branch store received credit for the same or if the main office took this revenue into their own accounts. The information submitted is so condensed in its presentation that such situations, or conditions are lost sight of.

From the foregoing it can be seen that it is possible to design an accounting system in such a manner and fashion as to permit the home office to take up into its own accounts profits of a branch store and at the same time show a loss on the branch store operations.

(Signed) James D. Huck, Jr.

[fol. 279] Sworn to and subscribed before me this 4th day of January, 1936. (Signed) Milton R. DeReyna, Notary Public.

[fol. 280] In United States District Court

[Title omitted]

Affidavit of James T. Burns—Filed May 28, 1935

State of Louisiana,
Parish of St. Tammany:

Before me, the undersigned authority, personally came and appeared Jas. T. Burns, who being duly sworn, deposes and says:

That he is a resident of the Parish of St. Tammany, State of Louisiana, and that since 1932 he has represented said Parish in the House of Representatives of the Legislature of the State of Louisiana.

Affiant further states that for some time he has recognized the need and the necessity of some curb, or some control, being placed on the chain stores operating in the State of Louisiana in order that the competition between them and the individually owned stores might be made more equitable; that this view, or opinion, is based upon his observation of the constant inroads being made in St. Tammany Parish, and surrounding territory by the chain systems on the local merchants. He has particularly observed the effects on local merchants of the chain store competition in the Towns of Covington, Hammond and Bogalusa, in which places the chain stores, through their great buying power, and systematized operations have gradually been pushing the small stores off the main streets, and it is only a question of time before they will be put out of business altogether.

Affiant further states that when he attended the first session of the Louisiana Legislature in 1932, a Chain Store Bill (Act 19 of 1932) was passed, levying a tax on chain [fol. 281] stores measured by the number of stores within the State of Louisiana. Affiant at that time thought that this was a just method of levying the tax on the chain stores, however, upon further study and observation of the effect of said tax, as provided in said Act, affiant became convinced that said method of taxation was not accomplishing the results desired, in that, said tax was not reaching in a just proportion the chain stores operating in Louisiana that had the greatest purchasing power by virtue of the great number of stores operated outside of the State of Louisiana, and because of the enormous volume of business done beyond the confines of this State. That as a result of this thought and study subsequent to the 1932 Regular Session of the Legislature, affiant, together with Mr. Claude Duke of New Orleans, who was likewise interested in chain store taxation, prepared the Bill which is now known as Act No. 51 of 1934. This Act was prepared with the view in mind that chain stores should be taxed on the basis of the number of units in the national chain, and not solely on the number of units operating in the State of Louisiana,

for the reason that it is the entire number of units that give the chain stores great purchasing power, and makes it practically impossible for the small chain, or locally owned stores to meet their competition. When affiant became co-sponsor of the present "Chain Store Tax Law" he had in mind a national chain that had only two stores within the State of Louisiana, and thus paid a minimum State tax, and yet was one of the largest national chain systems in the United States, and it is this type of chain store that has becoming more and more of a menace to individual effort, as typified by locally owned stores.

Affiant further states that in his opinion the present chain store tax law (Act 51 of 1934) is the fairest and most equitable method of taxation that could be had because the tax is graduated according to the number of units, or stores, that a chain has in the entire system, and thus does not penalize any one chain system over the other because of [fol. 282] one or more being located entirely within the confines of the State of Louisiana.

Affiant further shows that the present chain store tax law was enacted by the Louisiana Legislature after careful study and deliberation in both Committee, House and Senate, and after several public hearings had been held, at which time representatives of chain systems, local merchants and other interested parties had full opportunity to be present, and present their side of the case.

(Sgd.) Jas. T. Burns.

Sworn to and subscribed before me on this 6th day of February, 1936. (Sgd.) Hazel A. Warren, Dep. Clerk of Court & Ex-Officio Notary Public. (Seal.)

[fol. 283] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF LORRIS M. WIMBERLY—Filed May 28, 1935

STATE OF LOUISIANA,
Parish of East Baton Rouge:

Before me, the undersigned authority, personally came and appeared Lorris M. Wimberly, who, after being duly sworn did depose and say:

That he is a resident of the Parish of Bienville, State of Louisiana, and that since 1928 he has represented said Parish in the House of Representatives of the Legislature of the State of Louisiana.

Affiant further states that since 1928, and some time prior thereto, he has observed the rapid growth and development in Louisiana of chain stores; that he has made a study, the beginning of which dates back prior to 1928, of the effect of the rapid growth of chains, and their methods, upon the independent retailers in the State of Louisiana, and the effect of the methods of doing business engaged in by the larger chains, as related to the smaller chains.

Affiant further states that he, since 1920, has seen the various national chain organizations, with their enormous [fol. 284] purchasing power, and other advantages accruing by virtue of their operation of multiple units, come into the City of Shreveport, in the Parish of Caddo, Louisiana, and because of their ability to undersell the independent merchants, has forced the independent merchants in said City, to a large extent, out of business, this being especially true of the establishments formerly located on Texas Street, in the City of Shreveport, which street was the principal avenue of business in 1920, and that now instead of said businesses on said street being independently owned by the citizenship of the City of Shreveport and surrounding territory, with few exceptions, the large business houses are operated by national and sectional chains.

Affiant further states that the conditions described above also exist in the City of Monroe, Parish of Ouachita, in Northern Louisiana, and in the City of Alexandria, situated in the Parish of Rapides, State of Louisiana, and that now, and for the past three or four years, said national and sectional chains have been extending their operations into the smaller communities and towns and are now competing with the independent merchants in said smaller communities and towns, and that if something is not done to remedy the situation, it will be only a question of time before the same circumstances are existing in the smaller towns and communities as exist in the cities of Shreveport, Monroe and Alexandria, and other cities in Louisiana, that is, the retail business of the towns and communities being practically monopolized by chain operators.

Affiant further states that it is the exercise in Louisiana by said chains of the enormous purchasing power created

by the great number of units operated by the chain, to-
[fol. 285] gether with the advertising advantages, discounts obtained by virtue of the enormous purchasing power, reduction to a minimum of overhead operating expenses, the ability to maintain expert buyers in the various fields of production and the many other advantages accruing to the operators of multiple retail units that enable the chain operators to sell at such prices as render it impossible for an independent retailer or small chain operator to exist.

Affiant further states that the greater the number of retail units the greater the purchasing power of the chain, and that each retail unit contributes its pro rata part to the creation of the multiple advantages accruing to the chain operator, the entire number of units being one system with, ordinarily, one central purchasing agency.

Affiant further states that it was the condition herein described that the Legislature of Louisiana in the passage of Act No. 51 of 1934, sought to remedy.

Affiant further states that since the year 1928, he has been cognizant of the rapid growth and encroachment upon the retail field of chain stores in Louisiana, and recognized the necessity of the Legislature of Louisiana taking such action as is necessary to protect the welfare of its citizenship.

Affiant further states that the Legislature as evidenced by the passage of said Act, and affiant individually, believe and are of the opinion that the State of Louisiana, in its sovereign capacity, should encourage individual initiative among its citizenship, and individually owned, in preference to chain ownership, for the reason that the person makes a better citizen when he owns his own business establishment and is not a mere employee at a meager wage of some
[fol. 286] gigantic corporation whose officials he does not know, and whose officials do not recognize his needs and wants, and the employees accept work with the organization solely and only because, by reason of the size of the organization, he is unable to operate as an independent retailer and own his own establishment.

Affiant further states that when an individual citizen of Louisiana is unable to operate by reason of chain operations in his respective community, such condition operates against the general welfare of the State of Louisiana, and is a condition that the Legislature of Louisiana should take cognizance of and rectify, and it was these conditions and cir-

cumstances that the Legislature had in mind in the passage of the Act attacked in the present litigation.

Affiant further states that the method of arriving at the amount of tax due, as provided in Act No. 51 of 1934, attacked herein, is the fairest method of recognizing the multiple advantages accruing to the operators of a chain system for the reason that the total number of stores or retail units in a chain determine the rate of the tax, and the greater the number of units the greater the advantages.

Affiant further states, for example, a chain of fifteen thousand retail units operating throughout the entire United States, with one hundred stores in Louisiana, cannot fairly be classified as operating under the same circumstances as a chain with one hundred stores with all of them situated in Louisiana. On the one hand, the large chain has a central purchasing agency with power and finances to purchase for fifteen thousand retail units, while on the other hand the purchasing power of the smaller chain with one hundred units does not have the financial backing that the [fol. 287] larger chain has and is not in a position to obtain the prices nor concessions that can be obtained by the larger chain.

Affiant further states that the larger chain could purchase, for example, the entire output of a factory, or buy in train load lots, while the small chain, as it stands to reason, could purchase probably only by car load lots or less. The operator with one hundred units, however, would enjoy the advantage over the operator of a smaller unit, such as ten units, and the operator of ten units would in turn enjoy a distinct advantage over the operator of an independent establishment. In other words, affiant states that the larger the number of retail units in the organization, the greater the purchasing power, and the greater the advantages accruing to the operator.

Affiant further shows that the present chain store tax was enacted by the Louisiana Legislature after careful study and deliberation in both committee, House and the Senate, and after both the chain organizations and others had had an opportunity to present their side of the case.

(Signed) Lorris M. Wimberly.

Sworn to and subscribed before me on this the 6 day of February, 1936. (Signed) W. A. Cooper, Notary Public. (Seal.)

[fol. 288] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA

In Equity. No. 277

THE GREAT ATLANTIC & PACIFIC TEA COMPANY

versus

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS et al.

Monroe & Lemann, Attorneys for Complainants and Intervenors.

Gaston L. Porterie, Attorney General of Louisiana, Justin C. Daspit, Fred A. Blanche and E. L. Richardson, Special Assistants to the Attorney General, Attorneys for Defendants.

Before Foster and Hutcheson, Circuit Judges, and Borah, District Judge

OPINION OF THE COURT—Filed July 24, 1936

BORAH, District Judge:

This controversy involves the validity of the chain store license statute of Louisiana. Complainant, an Arizona corporation which with its affiliates operates 106 stores in Louisiana and a total of 15,082 elsewhere in the United States and in Canada, initiated this proceeding by the filing of a class bill in which twelve other foreign corporations operating retail units in Louisiana intervened and became co-plaintiffs, praying that the tax officials be enjoined from enforcing the Act. The complainants challenge the statute as violative of the due process and equal protection clauses of the Fourteenth Amendment, of the corresponding provisions of the Constitution of Louisiana, and of the com- [fol. 289] merce clause of the Federal Constitution. Upon the filing of the bill a temporary restraining order was issued after notice, restraining the enforcement of the statute against the complainants. The defendants agreed without prejudice to the ultimate rights of any party to the suit that it was proper for the matters involved to be held in statu- quo until a hearing could be held on the merits, and accordingly an order for an interlocutory injunction was issued by a specially constituted District Court upon the case made out by the affidavits of complainant and inter-

venors to the original and intervening bills. The case was in due course set down for hearing and the matter is now before the Court for disposition on the merits.

The statute here under review, Act 51 of the Louisiana Legislature of 1934, was enacted pursuant to the provisions of Section 10, Article 8 of the Constitution of Louisiana for the year 1921, authorizing the legislature of Louisiana to levy license taxes, and providing that such license tax may be classified, graduated or progressive.

Section 1 of the Act provides:

"Be it enacted by the Legislature of Louisiana, That because of the advantages accruing from the operation of multiple stores wherever situated, and because of the basic difference inherent in such character of operations, there be and is hereby levied an annual license tax for the year 1935 and for each subsequent year upon each person, firm, partnership, corporation or association of persons engaged in the business of operating, or maintaining, as part of a group or chain, any store or stores in this State, where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail under the same general management, supervision, owner-[fol. 290] ship or control, commonly known as branch or chain stores."

Section 3 of the Act provides:

"That the license tax for said business described in this Act levied upon the store or stores operated in the State of Louisiana shall be based on the number of stores or mercantile establishments included under the same general management, supervision, ownership or control, whether operated in this State or not, and shall be fixed and graded as follows, to-wit:

(1) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of not more than ten stores, the annual license shall be Ten ($10.00) Dollars for each such store operated in this State.

(2) Upon stores • • • having a total of more than ten stores, but not more than thirty-five stores, the annual license shall be Fifteen ($15.00) Dollars for each such store • • •.

(3) Upon stores • • • having a total of more than thirty-five stores, but not more than fifty stores, the annual license shall be Twenty ($20.00) Dollars for each such store • • •.

(4) Upon stores • • • having a total of more than fifty stores, but not more than seventy-five stores, the annual license shall be Twenty-five ($25.00) Dollars for each such store • • •.

(5) Upon stores • • • having a total of more than seventy-five stores, but not more than one hundred stores, the annual license shall be Thirty ($30.00) Dollars for each such store • • •.

(6) Upon stores • • • having a total of more than one hundred stores, but not more than one hundred twenty-five stores, the annual license shall be Fifty ($50.00) Dollars for each such store • • •.

(7) Upon stores • • • having a total of more than one hundred twenty-five stores, but not more than one hundred fifty stores, the annual license shall be One Hundred ($100.00) Dollars for each such stores • • •.

[fol. 291] (8) Upon stores • • • having a total of more than one hundred fifty stores, but not more than one hundred seventy-five stores, the annual license shall be One Hundred Fifty ($150.00) Dollars for each such store • • •.

(9) Upon stores • • • having a total of more than one hundred seventy-five stores, but not more than two hundred stores, the annual license shall be Two Hundred ($200.00) Dollars for each such store • • •.

(10) Upon stores • • • having a total of more than two hundred stores, but not more than two hundred twenty-five stores, the annual license shall be Two Hundred Fifty ($250.00) Dollars for each such store • • •.

(11) Upon stores • • • having a total of more than two hundred twenty-five stores, but not more than two hundred fifty stores, the annual license shall be Three Hundred ($300.00) Dollars for each such store • • •.

(12) Upon stores • • • having a total of more than two hundred fifty stores, but not more than two hundred seventy-five stores, the annual license shall be Three Hundred Fifty ($350.00) Dollars for each such store • • •.

(13) Upon stores • • • having a total of more that two hundred seventy-five stores, but not more than three hundred stores, the annual license shall be Four Hundred ($400.00) Dollars for each such store • • •.

(14) Upon stores • • • having a total of more than three hundred stores, but not more than four hundred stores, the annual license shall be Four Hundred Fifty ($450,00) Dollars for each such store • • •.

(15) Upon stores • • • having a total of more than four hundred stores, but not more than five hundred stores, the annual license shall be Five Hundred ($500.00) Dollars for each such store • • •.

(16) Upon stores • • • having a total of more than five hundred stores, the annual license shall be Five Hundred Fifty ($550.00) Dollars for each such store • • •."

The bill alleges, and it is admitted, that the complainant is engaged in the business of selling groceries, fruits, vegetables, poultry, meats, cheese, eggs and other foods, meats and dairy products or goods commonly sold in grocery [fol. 292] and meat stores, and has been so engaged for more than ten years. It operates under the same general management, supervision, ownership or control 15,082 stores, of which 14,800 are located in the United States and 282 are located in Canada. Of this number, 62 stores are located in the city of New Orleans and 44 stores are located at points in Louisiana outside the city of New Orleans, and it has capital invested in the State of Louisiana approximating half a million dollars.

The bill alleges that prior to the enactment of the 1934 statute, the tax imposed by the State of Louisiana upon chain stores was that established by Act 19 of the Louisiana Legislature of 1932. The Act of 1932, like the chain store tax statute of every other state in which such tax exists, provided for a classification based only upon the number of stores operated in the State and established ten classes comprising units of five each, and an eleventh class comprising all stores in excess of fifty. The tax upon stores in the last class under said Act was $200.00 per store; stores falling within the lower classes paying at lower rates according to number of stores in each class, the said rates ranging from $15.00 to $100.00 per store for stores less than fifty in number.

The bill charges that the purpose and effect of the 1934 statute was to reach operators of chains outside Louisiana so as to produce revenue for Louisiana by an extra-territorial tax and at the same time to discriminate in favor of local chains by reducing the rates applicable to a local chain and increasing the rates applicable to a foreign chain [fol. 293] even though the local chain may operate far more extensively in the State than does the foreign chain. Thus H. G. Hill Stores, Incorporated, which is in direct competition with the complainant, The Great Atlantic & Pacific Tea Company, and operates in New Orleans more stores than does the complainant, is required under the Louisiana statute to pay for its eighty-seven stores $30.00 per store, whereas the complainant has only sixty-three stores in New Orleans but each of said stores is required to pay a tax of $550.00.

In addition to the facts averred in the bill the complainants offered evidence to prove the following points:

Operations of chains doing business in more than one state vary greatly from section to section and from state to state because of differences in local conditions, economic and otherwise, freight rates added to cost, remoteness from headquarters and executive management, increase in difficulty of supervision, local competition and other factors.

Conditions as to sales and profits vary greatly in all classes of stores according to the section of the country in which they are located. In almost every case operations in Louisiana are less than average for all stores operated by the particular company.

In every important respect the operations of the complainant are the same as those of H. G. Hill Stores, In- [fol. 294] corporated. The gross volume of the sales of the Hill Stores in New Orleans is very much greater; they have more stores and do more business per store than the stores of the Great Atlantic & Pacific Tea Company, and under the Statute they pay $30.00 per store, while complainant is required to pay a maximum of $550.00 per store on every store.

Other corresponding differentials are set forth to show that one of the purposes and effects of the Louisiana Statute is to discriminate in favor of a company which operates in Louisiana a larger number of units than a competitor

which operates a smaller number of units in Louisiana, but a larger total number in the world.

With reference to the situation in Louisiana as of date February 10, 1936, the proof shows that complainant operated 109 stores of which 66 were in New Orleans; other food chains operated 197 stores; independent grocers operating under one general supervision and pooling their purchases operated 128 stores; and entirely independent grocers operated 2820 stores. The census reports further show that the number of chain stores in Louisiana is decreasing at a more rapid rate than the number of independent stores, and that the number of wholesale stores in Louisiana is actually increasing.

The defendants produced evidence to prove that the retail units operated in Louisiana by complainant and inter- [fol. 295] venors are part of a chain or system; that all the units of a retail chain contribute to the central purchasing power of the chain irrespective of state lines and location of stores and increases the per unit multiple advantages enjoyed by the operator of the system; that the greater the number of units in the chain, the greater the purchasing power, the greater the secret rebates and allowances, the greater the advantages in advertising, the greater the capital employed, the greater the social and economic consequences, and the lower the cost of distribution and overhead.

Testimony was also offered similar to that found in the original chain store tax case, State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527; 51 S. Ct. 540, establishing the difference in the type of operation between the operator of one store and the operator of many stores, and the difference in the type of operation, varying with the number of units, with additional reference to the difference in the method of operation of the Great Atlantic & Pacific Tea Company as compared with the H. G. Hill Stores.

In fine the record in this case shows the contribution to the advantages made by each unit in the chain, and the per unit advantage made possible by the whole system, and in that respect only does it differ materially from the proof which was before the court in the Jackson case. Indeed the only question presented here over and above that which received the consideration of the Court in State

Board of Tax Commissioners v. Jackson, supra; Louis K. [fol. 296] Liggett Company v. Lee, 288 U. S. 517, 53 S. Ct. 481; and Fox v. Standard Oil Company of New Jersey, 294 U. S. 87, 55 S. Ct. 333, is the method used by the Legislature of Louisiana in arriving at the rate of the tax per unit in Louisiana.

It is well settled under the authorities, supra, that there are differences and advantages in favor of large chains and for that reason the State may tax the large chains more heavily than the smaller ones, and upon a graduated basis. In the present case the State imposes a license or privilege tax, clearly within its authority, for the privilege of doing business in Louisiana. The measure of that tax is the number of units in the chain in the State. The rate is determined by the number of stores in the entire chain. No property beyond the jurisdiction of the State is in any just sense taxed under the statute. The rate only is affected by units of the chain outside of Louisiana and these units are considered only for the purpose of determining the type of business done in Louisiana and the value of the privilege of operating each unit in the State. Where as here the power to tax exists, the extent of the burden is a matter for the discretion of the legislature. The wisdom of its exercise is not the concern of this Court.

Complainants further contend that the Louisiana statute does not represent any policy to protect, and was not designed to, and does not in fact protect independent merchants against chains, but establishes an arbitrary discrim- [fol. 297] ination against chains operating in other States. "The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, American Sugar Rfg. Co. v. Louisiana, 179, U. S. 89, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman & Lewis Co., 240 U. S. 342; Quong Wing v. Kirkendall, 223 U. S. 59." Fox v. Standard Oil Co., supra. The statute here assailed classifies chain stores in accordance with the economic advantages which they possess and gives recognition to the basic differences of their operations.

It imposes a license tax for the privilege of operating retail units in multiple form reasonably adjusted in amount with regard to substantial differences in the value of the privilege exercised. The classification is neither arbitrary

nor capricious. The statute treats upon a similar basis all owners of chain stores similarly situated. In the light of what we have said this is all that is required by the equal protection clauses of the Federal and State Constitutions.

What has been said in respect of the contention that the tax establishes an arbitrary discrimination against chains operating in other states is a sufficient answer to the contention that property has been taken without due process of law.

It is asserted on behalf of the intervenors, Montgomery Ward & Company, Incorporated, and Sears-Roebuck & Company that the tax is invalid (1) because it is levied for [fol. 298] the privilege of operating stores conducting both interstate and intrastate business and the tax is not divisible in accordance with the respective amounts of intrastate and interstate business transacted, (2) because it is levied for the privilege of carrying on Louisiana business and is partly measured by interstate operations carried on wholly outside the State of Louisiana. The claim does not merit serious consideration. The statute by its express terms applies only "where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail."

The order heretofore entered granting an interlocutory injunction is recalled, and the decree for injunction denied, and the bill of complaint dismissed. Appropriate orders may accordingly be entered.

New Orleans, Louisiana, July 24, 1936.

Findings of Fact and Conclusions of Law—Filed December 18, 1936

[fol. 299] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT

The Court, pursuant to Equity Rule 70½, makes the following findings of fact:

I

The complainant, The Great Atlantic & Pacific Tea Company, an Arizona Corporation, is engaged in the business

of selling groceries, fruits, vegetables, poultry, meats, cheese, eggs and other foods, meats and dairy products or goods commonly sold in grocery and meat stores, and has been so engaged for more than ten years. It operates under the same general management, supervision, ownership or control 15,082 stores, of which 14,800 are located in the United States and 282 are located in Canada. Of this number, 62 stores are located in the City of New Orleans and 44 stores are located at points in Louisiana outside the City of New Orleans, and it has capital invested in the State of Louisiana approximating half a million dollars.

II

Under Act 19 of the Louisiana Legislature of 1932, the complainant, The Great Atlantic & Pacific Tea Company, was required to pay a chain store tax based upon the number of stores operated in Louisiana, which tax was calculated by brackets and under which the rates ranged from $15 in the lowest bracket to $200 in the highest bracket.

III

Under Act 51 of the Louisiana Legislature of 1934, the chain store tax is applied only to stores in Louisiana but the rate is determined by the total number of stores operated under the same general management, supervision, ownership or control wherever operated. Under this statute the complainant, The Great Atlantic & Pacific Tea Company, was required to pay a tax of $550 per store for every store located in Louisiana.

IV

The operations of the complainant, The Great Atlantic & Pacific Tea Company, in the City of New Orleans are the same in general character as those of H. G. Hill Stores, Inc., a Louisiana corporation, which operates 87 stores in New Orleans. Both the complainant and H. G. Hill Stores, Inc. operate a chain of grocery and meat stores carrying [fol. 300] about the same lines of merchandise, and their merchandising methods, leader items and selling prices are practically the same. The gross volume of sales of the Hill Stores in New Orleans is very much greater, they have more stores and do more business per store than does the complainant. The total purchasing power of the complainant, The Great Atlantic & Pacific Tea Company is much

greater than that of H. G. Hill Stores, Inc. The complainant has field offices located at primary markets, which are in charge of specialists and supervised by central purchasing offices in New York, and maintains divisional warehouses throughout the country. The operations of the Hill Stores are confined to Louisiana and chiefly to New Orleans. Under the Louisiana statute, the Hill Stores pay a tax of $30 per store.

V

As of date February 10, 1936 complainant operated 109 stores in Louisiana, of which 66 were in New Orleans; other food chains operated 197 stores; independent grocers operating under one general supervision and pooling their purchases operated 128 stores; and entirely independent grocers operated 2,820 stores. The number of chain stores in Louisiana is decreasing at a more rapid rate than the number of independent stores, and the number of wholesale stores in Louisiana is actually increasing.

VI

The retail units operated in Louisiana by complainant and intervenors are part of a chain or system. All the units of a retail chain contribute to the central purchasing power of the chain irrespective of state lines and location of stores and increase the per unit multiple advantage enjoyed by the operator of the system. The greater the number of units in the chain, the greater the purchasing power, the greater the secret rebates and allowances, the greater the advantages in advertising, the greater the capital employed, the greater the social and economic consequences, and the lower the cost of distribution and overhead. Each unit to the chain contributes to the advantages of the chain, and the whole system makes possible a per-unit advantage.

VII

Testimony was offered by the State similar to that found in the original chain store case, the State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527, 51 S. Ct. 540, establishing the difference in the type of operation between the operator of one store and the operator of many stores, and the difference in the type of operation, varying with the number of units, with additional refer-

ence to the difference in the method of operation of The Great Atlantic & Pacific Tea Company as compared with the H. G. Hill Stores, Incorporated.

VIII

In fine, the record in this case shows the contribution to [fol. 391] the advantages made by each unit in the chain, and the per unit advantage made possible by the whole system, and in that respect only does it differ materially from the proof which was before the Court in the Jackson case.

IX

Operations of chains doing business in more than one store vary greatly from section to section and from state to state because of differences in local conditions, economic and otherwise, freight rates added to cost, remoteness from headquarters and executive management, increase in difficulty of supervision, local competition and other factors. Conditions as to sales and profits vary greatly in all classes of stores according to the section of the country in which they are located. In almost every case operations in Louisiana are less than average for all stores operated by the particular company.

X

H. L. Green Company, Inc., a New York corporation, retails articles of merchandise at prices not exceeding $1. It operates a total of 127 stores in 33 states and the District of Columbia. It has one store in Louisiana. It is in competition in Louisiana with Morgan & Lindsey, a Texas corporation, which operates a total of 45 stores in Louisiana, Mississippi and Alabama, of which 28 are in Louisiana. Under the Louisiana statute H. L. Green Company, Inc. pay a tax of $100 on one store while Morgan & Lindsey pay $20 per store.

XI

Montgomery, Ward & Company, an Illinois corporation, operates 9 mail order establishments engaged in filling orders received from points in the United States and foreign countries through the mail. None of these mail order establishments are situated in Louisiana. The Company also has 19 mail order offices, none of which are situated in Louisiana; 17 Class A department stores carrying a com-

plete line of general merchandise, none of which are situated in Louisiana; 456 Class B retail stores of limited size and carrying a limited line of merchandise, of which 5 are located in Louisiana; and 16 Class C stores devoted exclusively to the sale of hardware, household appliances, automobile tires and tubes, of which none are located in Louisiana. The 5 Louisiana Class B stores take orders to be filled by mail from the Company's mail order establishment located at Forth Worth, in addition to selling merchandise at retail at its place of business to the public.

[fol. 302] XII

Sears, Roebuck & Company, a New York corporation, on January 29, 1935, operated 436 establishments of all kinds, of which 10 were mail order establishments, 2 sub-mail order offices, 6 agencies and the balance stores of 6 different sizes and types. In Louisiana the Company operated 2 "A" stores carrying all lines of merchandise, 1 "B-1" store and 1 "B-2" store carrying limited lines of merchandise.

XIII

F. W. Woolworth Company, a New York Corporation, on January 1, 1935 operated 2,634 stores, of which 1,811 were located in the United States, 37 in Canada, 8 in Cuba, 81 in Germany and 597 in Great Britain.

XIV

Liggett Drug Company, a Delaware corporation, operates 452 stores situated in 32 states and the District of Columbia, of which 6 stores are located in Louisiana. In New Orleans the Liggett Stores are in competition with 3 local chains and in Shreveport with 1 local chain. One of the local chains, Katz & Besthoff, Ltd. operates 10 stores in the State of Louisiana, all of which are in New Orleans. Katz & Besthoff's general methods of doing business are the same as those of Liggett, but the gross volume of the sales of Katz & Besthoff stores is very much greater, they have more business and do more business per store than the stores of Liggett. In the drug trade quantity discounts do not become any greater after a certain point is reached. Under the Louisiana statute the Liggett tax is $500 per store while the Katz & Besthoff tax is $10 per store.

XV

W. T. Grant Company, a Massachusetts corporation, operates 465 limited price department stores, of which 5 are in Louisiana and 460 are situated in 37 other states.

XVI

G. R. Kinney Company, Inc., a New York corporation, sells shoes at retail, and on January 1, 1935 operated 330 stores in 37 states, of which 3 were situated in Louisiana.

XVII

J. J. Newberry Company, a Delaware corporation, engaged in the operation of 5-10-25¢ stores of the variety type, operated in 1934 330 stores. It has three subsidiaries and had in 1934 2 stores in Louisiana (now only 1).

XVIII

J. C. Penny Company, a Delaware corporation selling general merchandise at retail, operated on January 1, 1935 1,474 stores in 48 states, of which 8 were located in Louisiana.

XIX

Scott-Burr Stores corporation, a Delaware corporation, operates 5¢ to $1 retail variety stores, of which on January 1, 1935, 135 stores were located in 26 states and 3 in Louisiana.

XX

Wohl Shoe Company, a Missouri corporation, operates leased shoe departments in department stores owned and operated by others, which departments are operated in the names and under the supervision of the owners of the stores. It operates a total of 209 such departments and also [fol. 303] operates 23 stores located in 36 states and the District of Columbia. Six of the department stores are located in Louisiana.

XXI

Consolidated Millinery Company, an Illinois corporation, operates leased departments in stores belonging to others, which are operated in the names and under the supervision of the department stores. The company operates leased millinery departments in 48 states and the District of Columbia, of which 5 are situated in Louisiana.

Conclusions of Law

I

The only question presented in the case at bar over and above that which received consideration of the Court in the case of State Board of Tax Commissioners of Indiana v. Jackson, supra; Louis K. Liggett Company v. Lee, 288 U. S. 517, 53 S. Ct. 481; and Fox v. Standard Oil Company of New Jersey, 294 U. S. 87, 55 S. Ct. 333, is the method used by the Legislature of Louisiana in arriving at the rate of the tax per unit in Louisiana.

II

It is well settled under the authorities, supra, that there are differences and advantages in favor of large chains and for that reason the State may tax the large chains more heavily than the smaller ones, and upon a graduated basis. In the present case the State imposes a license or privilege tax, clearly within its authority, for the privilege of doing business in Louisiana. The measure of that tax is the number of units in the chain in the State. The rate is determined by the number of stores in the entire chain. No property beyond the jurisdiction of the State is in any just sense taxed under the Statute. The rate only is affected by units of the chain outside of Louisiana and these units are considered only for the purpose of determining the type of business done in Louisiana and the value of the privilege of operating each unit in the State. Where as here the power to tax exists, the extent of the burden is a matter for the discretion of the Legislature. The wisdom of its exercise is not the concern of this Court.

III

Complainants contend that the Louisiana Statute does not represent any policy to protect, and was not designed to, and does not in fact protect independent merchants against chains, but establishes an arbitrary discrimination against chains operating in other states. "The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, American Sugar Rfg. Co. v. Louisiana, 179 U. S. 89, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman & Louis Co., 240 U. S. 342, Quong Wing v. Kirkendall, 223 U. S.

59." Fox v. Standard Oil Co., supra. The statute here assailed classifies chain stores in accordance with the economic advantages which they possess and gives recognition to the basic difference of their operations. It imposes a license tax for the privilege of operating retail units in multiple form reasonably adjusted in amount with regard to substantial differences in the value of the privilege exercised. The classification is neither arbitrary nor capricious. The statute treats upon a similar basis all owners of chain stores similarly situated. In the light of what we have said this is all that is required by the equal protection [fol. 304] clauses of the Federal and State Constitutions.

IV

What has been said in respect of the contention that the tax establishes an arbitrary discrimination against chains operating in other states is a sufficient answer to the contention that property has been taken without due process of law.

V

It is asserted on behalf of the intervenors, Montgomery Ward & Company, Incorporated, and Sears-Roebuck & Company that the tax is invalid (1) because it is levied for the privilege of operating stores conducting both intra-state and interstate business and the tax is not divisible in accordance with the respective amount of intra-state and interstate business transacted, (2) because it is levied for the privilege of carrying on Louisiana business and is partly measured by interstate operations carried on wholly outside the State of Louisiana. The claim does not merit serious consideration. The statute by its express term applies only "where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail."

(Signed) Rufus E. Foster, U. S. Circuit Judge.
(Signed) J. C. Hutcheson, Jr., U. S. Circuit Judge.
(Signed) Wayne G. Borah, U. S. District Judge.

[fol. 305] IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTIONS OF COMPLAINANT AND INTERVENORS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed December 18, 1936

Now come complainant and intervenors in the above entitled and numbered cause and object and except as follows to the findings of fact adopted by the Court:

Complainant and intervenors object and except to Paragraphs VI, VII and VIII of said findings of fact.

Complainant and intervenors further object and except to the failure of the Court to include in its findings of fact the finding that the Federal Trade Commission's investigation of chain stores failed to show any general advantage which chains enjoy, even in purchasing power, after reaching a certain size.

Complainant and intervenors further object and except to the failure of the Court to include in its findings of fact the finding that the Federal Trade Commission's investigation of chain stores affirmatively show- that in some lines of business, there is a tendency for profits to decrease with number of operating units as shown by Senate Document No. 40, 73rd Congress, First Session, Table 32, page 55, and Senate Document No. 4, 74th Congress, First Session.

Complainant and intervenors further object and except to the failure of the Court to include in its findings of fact the findings made by the Federal Trade Commission in its annual report to Congress for the fiscal year ended June 30, 1935, namely that there is little evidence of any close general relationship between the size of a chain and either the average sales per store or gross margin of profit or operating expenses or percentage of net profits on sales and inventory turnover.

And complainant and intervenors further object and except to the conclusions of law and each of them.

(Signed) Monroe & Lemann, Solicitors for Complainant and Intervenors.

Order Overruling and Reserving Exceptions

The foregoing objections and exceptions of complainant and intervenors are overruled by the Court, but the rights of complainant and intervenors to complain upon appeal are fully reserved.

Dated December 18, 1936.

(Signed) Rufus E. Foster, United States Circuit Judge. (Signed) J. C. Hutcheson, Jr., United States Circuit Judge. (Signed) Wayne G. Borah, United States District Judge.

[fol. 306] In United States District Court

[Title omitted]

Exceptions of Respondents to Findings of Fact—Filed December 18, 1936

Now come respondents in the above entitled and numbered cause and object and except as follows to the findings of fact adopted by the Court:

Respondents object and except to the finding of the Court in Paragraph V of the findings of fact that the number of chain stores in Louisiana is decreasing at a more rapid rate than the number of independent stores, and that the number of wholesale stores in Louisiana is actually increasing.

Respondents object and except to the following statement in the finding of the Court in Paragraph IV of the findings of fact:

"The operations of the complainant, The Great Atlantic & Pacific Tea Company, in the City of New Orleans, are the same in general character as those of the H. G. Hill Stores, Inc., a Louisiana corporation, • • •."

Respondents further object and except to the finding of the Court contained in Paragraph XIV of the findings of fact, that Katz & Besthoff's general methods of doing business is the same as those of Liggett, intervenor.

(Signed) E. L. Richardson, Solicitor for Respondents.

Order Overruling and Reserving Exceptions

The foregoing objections and exceptions of respondents are overruled by the Court, but the rights of respondents to complain upon appeal are fully reserved.

Dated December 18th, 1936.

(Signed) Rufus E. Foster, United States Circuit Judge. (Signed) J. C. Hutcheson, Jr., United States Circuit Judge. (Signed) Wayne G. Borah, United States District Judge.

[fol. 307] In United States District Court, Eastern District of Louisiana, New Orleans Division

In Equity. No. 277

The Great Atlantic & Pacific Tea Company, Plaintiff,

versus

Alice Lee Grosjean, Supervisor of Public Accounts, and Gaston L. Porterie, Attorney General of the State of Louisiana, Defendants

Final Decree—Filed December 18, 1936

This cause came on for hearing on application of Plaintiff and Intervenors for an interlocutory injunction or injunction pendente lite herein on June 24, 1935, and was submitted to the court for decision upon the pleadings and exhibits and affidavits of Plaintiff and Intervenors to the original Bill of Complaint and the intervening Bills of Complaint offered in evidence herein, whereupon, the Defendants, through their counsel of record, agreed without prejudice to the ultimate rights of any party to this suit, whether such party be the Complainant, the Defendants or anyone of the Intervenors, that it was proper for the matters involved to be held in statu quo until the hearing might be heard upon the merits, and the Court being of the opinion that the issuance of an interlocutory injunction was proper, did on said date, issue an interlocutory decree, in accordance with the prayer of the Bill of Complaint, and the intervening Bills of Complaint.

Thereafter, to-wit: On May 28, 1936, this cause was submitted to the Court for consideration upon the merits,

upon the testimony and evidence offered, and the record as made up, and after argument and briefs submitted, and the Court having considered the same, pursuant to its opinion filed herein on July 24, 1936, and its findings and conclusions of law filed herein on December 18, 1936, the Court now adjudges and decrees, as follows:

(1) That Act #51 of the Louisiana Legislature of 1934 is valid, and is not violative of the Constitution of the State of Louisiana or the Constitution of the United States.

(2) That Plaintiff and Intervenors take nothing by their bills of complaint, and, the same are hereby dismissed, Defendants to recover from Plaintiff and Intervenors their costs herein expended.

(3) That Complainant and Intervenors, having this day stated in Court, their intention to appeal from this decree, it is hereby ordered and adjudged that the interlocutory injunctions heretofore granted in this cause shall be con-
[fol. 308] tinued in effect as to the Complainant and Intervenors until the final determination of said appeal, upon Plaintiff and Intervenors giving bond, to be approved by the Court, as required by law, in a sum and amount to be fixed by the Court in the orders of appeal.

New Orleans, Louisiana, December 18th, 1936.
(Signed) Rufus E. Foster, United States Circuit Judge. (Signed) J. C. Hutcheson, Jr., United States Circuit Judge. (Signed) Wayne G. Borah, United States District Judge.

[fol. 309] In United States District Court

[Title omitted]

Petition for Appeal—Filed December 18, 1936

Complainant, The Great Atlantic & Pacific Tea Company, and intervenors, H. L. Green Company, Inc., Montgomery, Ward & Company, Sears, Roebuck & Company, F. W. Woolworth Company, Liggett Drug Company, W. T. Grant Company, C. R. Kinney Company, Inc., J. J. Newberry Company, J. C. Penney Company, Scott-Burr Stores Corporation, Wohl Shoe Company and Consolidated Mil-

linery Company, pray that they and each of them may be permitted to take an appeal from all the findings, orders, decree and judgment of the District Court of the United States for the Eastern District of Louisiana, sitting as a three-judge Court, composed of the Honorable Rufus E. Foster, United States Circuit Judge, the Honorable Joseph C. Hutcheson, United States Circuit Judge, and the Honorable Wayne G. Borah, United States District Judge, duly entered in said Court on or about the — day of December, 1936, wherein the findings, order, decree and judgment were made and rendered in favor of the defendants in the above entitled and numbered cause and against complainant and intervenors, dismissing the bills of complaint herein filed by complainant and intervenors. The appeal herein prayed for is taken upon the grounds and for the reasons specified in the Assignment of Errors filed herewith.

Wherefore complainant and intervenors pray that an appeal be allowed to them in the said District Court of the United States for the Eastern District of Louisiana, sitting as above stated, to the Supreme Court of the United States and that a transcript of the records, proceedings and papers upon and under which such findings, orders, decree and judgment were made, be duly authenticated and sent to the Supreme Court of the United States. Complainant and intervenors further pray that a supersedeas may be granted pending the final disposition of said case and the amount of the security be fixed by the order allowing the appeal and that citation issue as provided by law.

(Signed) Monroe & Lemann, Solicitors for Complainant and Intervenors

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[fol. 310] In United States District Court

[Title omitted]

Assignment of Errors—Filed December 18, 1936

Come now complainant and intervenors in the above entitled and numbered cause and file simultaneously with their petition for appeal and as a part thereof the following Assignment of Errors upon which they and each of them will rely in prosecution of the appeal petitioned for

in said case from the final findings, order, decree and judgment of the District Court of the United States for the Eastern District of Louisiana, sitting as a three-judge Court, which said final decree and judgment was duly entered in said Court on the — day of December, 1936:

(1) The Court erred in failing to hold that the challenged statute (Act 51 of the Louisiana Legislature of 1934) is unconstitutional because it violates the Fourteenth Amendment of the Constitution of the United States by taxing property and operations beyond the jurisdiction of the State.

(2) The Court erred in failing to hold that the challenged Louisiana statute is void because it requires a corporation to pay increased taxes to Louisiana by virtue of what it does outside Louisiana and requires a corporation which actually decreases its operations in Louisiana to pay increased taxes in Louisiana because of what it does outside Louisiana.

(3) The Court erred in failing to hold that the Louisiana statute is especially arbitrary in taxing operations outside Louisiana, irrespective of the remoteness of those operations and of their character or connection with operations within Louisiana and in proceeding upon the theory that mercantile establishments are fungible and all stores everywhere are of the same character and value.

(4) The Court erred in failing to hold that the State of Louisiana has no power by the adoption of the challenged statute to exclude foreign corporations by erecting economic barriers along its borders and by making chains out of corporations never heretofore so considered.

(5) The Court erred in failing to hold that the Louisiana statute does not represent any policy to protect, and was not designed to and does not in fact protect, independent merchants against chains, but establishes an arbitrary discrimination against chains operating in other States.

(6) The Court erred in failing to hold that the challenged Louisiana statute is unconstitutional under the Fourteenth Amendment of the Constitution of the United States because it denies to plaintiff and intervenors the equal protection of the laws.

(7) The Court erred in failing to hold that the challenged Louisiana statute denies to complainant, The Great Atlantic & Pacific Tea Company, the equal protection of the laws by imposing upon each of its stores in Louisiana a tax of $550 per store while imposing upon a competitor doing a similar business and operating a substantially similar number of stores in the State a tax of only $30 per store.

[fol. 311] (8) The Court erred in failing to hold that the challenged Louisiana statute denies to intervenor Liggett Drug Company the equal protection of the laws by imposing upon each of its stores in Louisiana a tax of $500 per store while imposing upon a competitor, Katz & Besthoff, who operates a greater number of stores in Louisiana and enjoys every advantage that Liggett Drug Company enjoys, a tax of only $10 per store.

(9) The Court erred in failing to hold that the challenged Louisiana statute denies to the other intervenors the equal protection of the laws by imposing upon each of their stores in Louisiana taxes much beyond the taxes imposed upon competitors who operate more stores in Louisiana.

(10) The Court erred in failing to hold that the Louisiana statute is invalid because it places the Louisiana stores in the highest bracket of the classification which it establishes by virtue of the existence of stores outside Louisiana in other States and Countries which upon a maintenance of the Louisiana Statute would be entitled to apply a similar rule with the result that every store would be subject to a maximum tax in every State.

(11) The Court erred in failing to hold that the Louisiana statute is invalid because it burdens and interferes with interstate commerce.

(12) The Court erred in failing to hold that the Louisiana statute places a direct burden upon interstate commerce operations in the mail order business of intervenors Montgomery Ward & Company and Sears, Roebuck & Company.

(13) The Court erred in holding that the Louisiana statute can be maintained because "all the units of the retail chain contribute to the central purchasing power of the chain, irrespective of state lines and locations of stores, and increase the per unit multiple advantage enjoyed by the

operator of the system. The greater the number of units in the chain, the greater the purchasing power, the greater the secret rebates and allowances; the greater the advantages in advertising, the greater the capital employed, the greater the social and economic consequences and the lower the cost of distribution and overhead," and in failing to hold, as found by the Federal Trade Commission, that there is no sufficient evidence of any general advantage which chains enjoy even in purchasing power, after reaching a certain size; that in some lines of business there is a tendency for profits to decrease with number of operating units; that there is little evidence of any close general relationship between the size of the chain and either the average sales per store or gross margins or operating expenses or net profits.

(14) The Court erred in holding that the record showed the contribution to the advantages made by each unit in the chain and the per unit advantage made possible by the whole system.

(15) The Court erred in dismissing the bills of complaint of complainant and intervenors and in finding and decreeing that judgment be rendered against them and in favor of defendants.

Prayer for Reversal

Wherefore for each and all of the reasons set forth in the foregoing Assignment of Errors, complainant and intervenors pray that the decree herein appealed from be reversed with directions to the District Court to set aside its said decree and, in lieu thereof, to render a decree in all [fol. 312] respects in accordance with the prayer of the bills of complaint of complainant and intervenors.

(Signed) Monroe & Lemann, Solicitors for Complainant and Intervenors.

Service of the foregoing Assignment of Errors is hereby accepted and receipt of copy acknowledged this 18 day of December, 1936.

(Signed) E. L. Richardson, Solicitors for Defendants.

[fol. 313] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

In Equity. No. 277

THE GREAT ATLANTIC & PACIFIC TEA COMPANY

versus

ALICE LEE GROSJEAN, Supervisor of Public Accounts, et al.

ORDER ALLOWING APPEAL—Filed December 18, 1936

This day came complainant and intervenors and filed herein their petition of appeal to the Supreme Court of the United States from the final decree herein rendered by this Court on the — day of December, 1926, and filed also their Assignment of Errors in support of said petition.

Therefore, it is Ordered by the Court:

(1) That the appeal to the Supreme Court of the United States prayed for by complainant and intervenors, as set forth in their petition for appeal, be and the same is hereby allowed as prayed for in said petition.

(2) That a transcript of such parts of the records and proceedings herein as the parties may be præcipe duly designate be transmitted, duly authenticated, to the Supreme Court of the United States in the manner provided by law.

(3) That a citation be issued, admonishing the defendants and each of them to be and appear in the Supreme Court of the United States within thirty days from this date as provided by law.

(4) That one appeal bond for costs and damages upon said appeal in the penal sum of One Thousand Dollars ($1,000) shall be given by complainant and intervenors conditioned as provided by law.

(5) That the interlocutory injunctions heretofore granted in this case shall be continued in effect as to complainant and intervenors until the final determination of said appeal, conditioned upon the filing by complainant and intervenors respectively within thirty days from this date of bonds to cover the taxes accruing under the challenged statute for

the years 1935, 1936 and 1937, interest, penalties and attorneys' fees in the amounts hereinafter stated. Upon the filing and approval of new bonds for the amounts herein required, all bonds previously filed in this cause shall be of no further force and effect. The bonds herein required shall be approved by the District Judge residing in the Eastern District of Louisiana. The amounts of the new bonds to be furnished by complainant and intervenors respectively, in order that the interlocutory injunctions heretofore issued may be continued in full force and effect pending the disposition of the appeal, are hereby fixed as follows:

The Great Atlantic & Pacific Tea Company	$252,000.00
W. T. Grant Company	11,000.00
H. L. Green Company	500.00
G. R. Kenny Co., Inc.	6,000.00
Liggett Drug Co., Inc.	13,000.00
Melville Shoe Corp.	17,000.00
Montgomery Ward Co.	11,000.00
[fols. 314-316] J. J. Newberry Co.	150.00
J. C. Penny Co.	19,000.00
Sears Roebuck Co.	9,000.00
Scott Burr Store Corp.	1,000.00
Wohl Shoe Corp.	8,000.00
F. W. Woolworth Co.	33,000.00
Consolidated Millinery Co.	5,000.00

New Orleans, La., December 18th, 1936.

(Signed) Rufus E. Foster, United States Circuit Judge. (Signed) J. C. Hutcheson, Jr., United States Circuit Judge. (Signed) Wayne G. Borah, United States District Judge.

[fols. 317-319] Bond on appeal for $1,000.00, approved and filed January 7, 1937, omitted in printing.

Citations, in usual form, showing service on L. E. Richardson, filed January 6, 1937, omitted in printing.

[fol. 320] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF PLAINTIFF AND INTERVENORS FOR REDUCTION OF AMOUNT OF BONDS FOR INTERLOCUTORY INJUNCTIONS—Filed December 22, 1936

To the Honorable the United States District Court for the Eastern District of Louisiana:

Now come complainant and intervenors in the above entitled and numbered matter and respectfully show the Court as follows:

(1) By the order entered herein on December 18, 1936, the Court provided that the interlocutory injunctions heretofore granted in this case should be continued in effect until the final determination of the appeal, conditioned upon the filing of bonds to cover taxes under the challenged statute for the years 1935, 1936 and 1937, interest, penalties and attorneys' fees, in the amounts stated in said order.

(2) Said order should be modified insofar as it requires penalties and attorneys' fees to be included in the computation of the bonds. Complainant and intervenors should not be subjected to penalties for provoking a judicial decision upon the constitutionality of a statute so novel as the Louisiana statute and with respect to which reasonable doubt as to its validity must in any event be conceded to exist. The Louisiana law makes no adequate provision for the recovery of the taxes paid under protest and complainant and intervenors were, therefore, unable to pay the taxes in controversy and sue for their recovery. The penalty provided by the Louisiana statute of 2% per month plus attorneys' fees amounts to 24% per year plus attorneys' fees and, in the case of the 1935 tax, the penalties and attorneys' fees aggregate about 65% of the tax.

Wherefore complainant and intervenors respectfully move the Court that the amount of the bonds to be furnished by them, in order that the interlocutory injunctions heretofore granted in this case be continued in effect, be [fol. 321] reduced to the following amounts which in each case cover the principal of the tax which will accrue pending the litigation plus interest thereon at 5% per annum

to May 1, 1937, by which time a final judgment in the Supreme Court is anticipated:

The Great Atlantic & Pacific Tea Company	$190,000.00
W. T. Grant Company	8,000.00
H. L. Green Company	500.00
G. R. Kinney Co., Inc.	5,000.00
Liggett Drug Co., Inc.	10,000.00
Melville Shoe Corp.	13,000.00
Montgomery Ward & Co.	8,000.00
J. J. Newberry Co.	150.00
J. C. Penney Co.	14,000.00
Sears, Roebuck & Co.	6,000.00
Scott Burr Stores Corp.	1,000.00
Wohl Shoe Corp.	6,000.00
F. W. Woolworth Co.	25,000.00
Consolidated Millinery Co.	4,000.00

(Signed) Monroe & Lemann, Solicitors for Complainant and Intervenors.

[fols. 322-326] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DISMISSING MOTION OF COMPLAINANT AND INTERVENORS FOR REDUCTION OF AMOUNTS OF BONDS FOR INTERLOCUTORY INJUNCTIONS AND RESERVING THE QUESTION—Filed January 4, 1937

The application of the complainant and intervenors filed herein on the 22 day of December, 1936, having been considered by the Court and the Court being of the opinion that the amount of the bonds should not be recuded at this time but that the right should be reserved to the complainant and intervenors to be heard in this Court as to their liability for penalties and attorneys' fees on the taxes accruing under the challenged statute should the validity of such statute be finally upheld:

It is Ordered by the Court that the application filed herein by complainant and intervenors on the 22 day of December, 1936, for a reduction in the amount of bonds to be furnished as a condition to the keeping in force of the interlocutory injunction heretofore granted herein, be rejected at this time but with the express reservation to com-

plainant and intervenors of the right to be heard in this Court as to their liability for penalties and attorneys' fees on the taxes accruing under the challenged statute should the validity of such statute be finally upheld.

The exceptions and objections of complainant and intervenors and of defendants to this order are hereby fully reserved.

Dated January 4, 1937.

(Signed) Rufus E. Foster, United States Circuit Judge. (Signed) J. C. Hutcheson, Jr., United States Circuit Judge. (Signed) Wayne G. Borah, United States District Judge.

[fol. 327] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RELATIVE TO PRÆCIPE FOR TRANSCRIPT OF RECORD ON APPEAL—Filed January 7, 1937.

It is hereby stipulated and agreed by and between the complainant and intervenors and the defendants by their respective solicitors as follows:

(a) Each and all of said parties hereby waives the filing and service of a praecipe relative to the matters to be certified to the Supreme Court of the United States as to the transcript of the record on the appeal herein, and in lieu thereof the parties hereto request and direct the Clerk of this Court to prepare and certify the transcript of the record in the above entitled cause for the use of the Supreme Court of the United States and include therein the following, which the parties agree constitutes all of the record material to the question presented by this appeal (dates of filing to be shown upon all pleadings and orders, to-wit:

1. The original bill of complaint.
2. Complainant's application for restraining order and temporary injunction.
3. Motion of intervenors for leave to file interventions and for restraining order and temporary injunction.
4. Intervening bill of complaint of Liggett Drug Company, Inc.
5. Intervening bill of complaint of Montgomery, Ward & Co., Incorporated.

6. Order dated February 27, 1935 granting temporary restraining order.

7. Order permitting filing of interventions and extending restraining order.

8. Order continuing restraining order in force until application for interlocutory injunction heard.

9. Order for interlocutory injunction.

10. Answer of defendants to original bill of complaint.

11. Stipulation dated April 27, 1936.

12. Supplemental stipulation dated May 28, 1936.

13. Affidavits and rebuttal affidavits of witnesses for plaintiff and intervenors made by the following individuals on the following dates: J. B. Breckinridge, July 23, 1935; J. C. Peregoy, July 12, 1935 and February 10, 1936; David T. Bofinger, January 2, 1936; Roland Ladreyt, December 27, 1935; James F. Stewart, May 21, 1935; R. W. Story, July 17, 1935, February 10, 1936 and February 20, 1936; [fol. 328] H. D. Kittinger, May 27, 1935 and February 24, 1936; Phoenix S. Franks, May 31, 1935 and February 5, 1936; Irving F. Strom, July 16, 1935; L. O. Schmidt, July 16, 1935; J. A. Donaldson, July 18, 1935; C. B. Fullerton, May 21, 1935; Walter C. Schulz, November 15, 1935; A. J. Raskopf, August 23, 1935; E. P. Tolley, July 13, 1935 and February 20, 1936; C. L. Schenk, May 11, 1935 and February 21, 1936; William H. Schield, May 11, 1935; J. T. Leftwich, May 27, 1935, February 10, 1936 and March 16, 1936; Paul H. Nystrom, March 16, 1936.

14. Affidavits of witnesses for defendants made by the following individuals: W. C. Sugg, October 15, 1935; A. D. Turner, October 16, 1935; C. B. Ellis, October 17, 1935; E. M. Steen, October 17, 1935; Joe Isaacman, October 18, 1935; A. A. Allen, November 22, 1935; Clark Faulk, October 26, 1935; B. Morgan, November 23, 1935; J. W. Baker, J. S. Trisconi, J. W. Elston, W. C. Marshall and J. H. Brown, November 27, 1935; W. E. Penick, November 23, 1935 and exhibits attached; and March 16, 1936; James D. Huck, Jr., January 4, 1936; James T. Burns, November 6, 1935; and Lorris M. Wimberly, November 6, 1935.

15. Opinion of Court filed July 24, 1936.

16. Findings of fact and conclusions of law filed December 18, 1936.

17. Exceptions of plaintiff and intervenors to findings of fact and conclusions of law.

18. Exceptions of respondents to findings of fact.
19. Final decree.
20. Petition for appeal.
21. Assignment of errors.
22. Order allowing appeal.
23. Bond on appeal.
24. Citation and service.
25. Motion of plaintiff and intervenors for reduction of amount of bonds for interlocutory injunctions and such order as may be rendered thereon.
26. Notice pursuant to Rule 12 of the Rules of the Supreme Court of the United States and acknowledgment of service thereon.
27. This stipulation and order approving same.
28. Any applications and orders made extending time within which to file record with the Supreme Court of the United States.

(b) It is hereby stipulated and agreed that the intervening bills of complaint filed herein (other than that filed for Montgomery, Ward & Co., Incorporated) are all substantially in the form of that filed for Liggett Drug Company, Inc. with appropriate changes in figures to correspond to the facts in the individual cases.

(c) The Clerk of the United States District Court may certify the record as presented by counsel without comparing the same with the original papers filed with the Court.

Dated New Orleans, La. January 6, 1937.

(Signed) Monroe & Lemann, Solicitors for Plaintiff and Intervenors. (Signed) E. L. Richardson, Solicitor for Defendants.

[fol. 329] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPROVING STIPULATION FOR PRÆCIPE—Filed Jan. 7, 1937

On motion of Monroe & Lemann, attorneys for complainant and intervenors and of E. L. Richardson, Esq. of counsel for defendants in the above entitled and numbered cause, and on suggesting to the Court that the parties have entered

into a stipulation relative to the præcipe for record, the original of which is filed herewith:

It is Ordered by the Court that the attached stipulation relative to the praecipe for record be and it hereby is approved, and that the transcript of the record be made up in accordance therewith.

January 7, 1937.

(Signed) Wayne G. Borah, United States District Judge.

[fol. 330] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 331] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed January 14, 1937

Come now The Great Atlantic & Pacific Tea Company, H. L. Green Company, Inc., Montgomery, Ward & Company, Sears, Roebuck & Company, F. W. Woolworth Company, Liggett Drug Company, W. T. Grant Company, G. R. Kinney Company, Inc., J. J. Newberry Company, J. C. Penney Company, Scott Burr Stores Corporation, Wohl Shoe Company and Consolidated Millinery Company, appellants in the above entitled cause and adopt their assignment of errors as their statement of the points to be relied upon; and state that the whole of the record as filed is necessary in a consideration of the case.

Monroe & Lemann, Solicitors for Appellants.

Service of a copy of the within and foregoing statement is hereby acknowledged.

January 9, 1937.

E. L. Richardson, Solicitor for Appellees.

[fol. 332] [File endorsement omitted.]

Endorsed on cover: Enter Monte M. Lemann. File No. 41,192. E. Louisiana, D. C. U. S. Term No. 652. The Great Atlantic & Pacific Tea Company, et al., Appellants, vs. Alice Lee Grosjean, Supervisor of Public Accounts, State of Louisiana, et al. Filed January 14, 1937. Term No. 652, O. T., 1936.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 652

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, ET AL.,

Appellants,

vs.

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS, STATE OF LOUISIANA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

STATEMENT AS TO JURISDICTION.

J. BLANC MONROE,
MONTE M. LEMANN,
Counsel for Appellants.

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STATUTES CITED.

Act No. 51 of the Louisiana Legislature of 1934 (found at pages 251 to 255 of the official edition of Acts Passed by the Legislature of the State of Louisiana at Regular Session Begun and Held in the City of Baton Rouge on the 14th day of May, 1934), amending and reenacting the Title and Sections 1, 3, 5, 6, and 7 of Act 19 of the Louisiana Legislature of 1932, to be found at pages 125 to 128 of the official edition of Act Passed by the Legislature of the State of Louisiana at Regular Session Begun and Held in the City of Bton Rouge on the 9th day of May, 1932 2
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UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

IN EQUITY.

No. 277

THE GREAT ATLANTIC & PACIFIC TEA COMPANY

versus

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS, ET AL.

STATEMENT IN CONFORMITY WITH PARAGRAPH 1 OF RULE 12 OF RULES OF THE SUPREME COURT OF THE UNITED STATES.

The basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the decree signed on December 18, 1936, in the above entitled and numbered cause is that such decree is a final decree denying a permanent injunction in a suit to restrain the enforcement of a statute of the State of Louisiana, to wit, Act 51 of the Louisiana Legislature of 1934 by restraining the action of officers of such State in the enforcement of such statute under Section 266 of the Judicial Code as amended, being Section 360 of Title 28 United States Code.

(a) The statutory provision believed to sustain the jurisdiction is Section 238 of the Judicial Code as amended,

being Section 345 of Title 28 United States Code, paragraph (3).

(b) The statute of the State the validity of which is involved is Act 51 of the Louisiana Legislature of 1934, to be found at pages 251 to 255 of the official edition of Acts Passed by the Legislature of the State of Louisiana at regular session begun and held in the City of Baton Rouge on the 14th Day of May, 1934. Said Act amends and reenacts the Title and Sections 1, 3, 5, 6, and 7 of Act 19 of the Louisiana Legislature of 1932, to be found at pages 125 to 128 of the official edition of Acts Passed by the Legislature of the State of Louisiana at regular session begun and held in the City of Baton Rouge on the 9th day of May, 1932.

(c) The date of the decree sought to be reviewed is December 18, 1936, and the date upon which application for appeal was presented is also December 18, 1936.

The challenged Louisiana statute undertakes to levy a license tax upon persons and corporations operating two or more mercantile establishments anywhere in the world if one of the stores so operated is located in Louisiana, and fixes the rate of taxes on stores so located in Louisiana by reference to the total number of stores or mercantile establishments located anywhere in the world operated under the same general management, supervision, ownership or control.

The grounds for the attack upon the statute are that it violates (1) the 14th Amendment to the Constitution of the United States by taxing property and operations beyond the jurisdiction of the State and denying to plaintiff and intervenors the equal protection of the laws, and (2) the provisions of the Constitution of the United States prohibiting the State from burdening or interfering with Interstate Commerce.

Cases believed to sustain the jurisdiction are *Safety Deposit Trust Company* v. *Virginia*, 280 U. S. 83; *Provident Savings Association* v. *Kentucky*, 239 U. S. 103; *Bethlehem Motors Corporation* v. *Flynt*, 256 U. S. 421; *Fidelity and Deposit Company of Maryland* v. *Tafoya*, 270 U. S. 426; *Frick* v. *Pennsylvania*, 268 U. S. 473; *Delaware, L., etc., Railroad Company* v. *Pennsylvania*, 198 U. S. 341; *Louisville, etc., Ferry Company* v. *Kentucky*, 188 U. S. 385; *New York Life Insurance Company* v. *Head*, 234 U. S. 149; *Western Union Telegraph Company* v. *Kansas*, 216 U. S. 1; *Looney* v. *Crane Company*, 245 U. S. 178; *Airway Electric Appliance Corporation* v. *Day*, 266 U. S. 71; *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 122; *Cooney* v. *Mountain States Telephone & Telegraph Company*, 294 U. S. 384; *Colgate* v. *Harvey*, 296 U. S. 404; *Stewart Dry Goods Company* v. *Lewis*, 294 U. S. 550.

The grounds upon which it is contended that the questions involved are substantial are: that the Louisiana statute taxes operations beyond the borders of Louisiana; it makes the amount of taxes payable to Louisiana depend on operations outside of Louisiana; under the statute the taxes due the State of Louisiana may be increased even though operations in Louisiana decrease if operations outside Louisiana increase; the Louisiana statute taxes operations outside of Louisiana irrespective of their remoteness and lack of bearing upon Louisiana operations; the statute arbitrarily discriminates against chains operating in other States; it taxes Louisiana operations of foreign chains at a rate far greater than the rate applicable to Louisiana chains doing a far greater volume of business in Louisiana; it proceeds on the theory that operations everywhere are of the same character and value; it places every store of every chain in the highest bracket subject to the maximum tax in every State; its maintenance would give the State power by taxation to

exclude from the State corporations operating in other States; it burdens and interferes with interstate commerce by affecting operations outside the State and particularly by its applicability to the mail order business of certain otherwise intervenors.

A copy of the opinion delivered upon the rendering of the decree sought to be reviewed is appended hereto.

(Signed) MONROE & LEMANN,
Solicitors for Appellants.

EXHIBIT "A".

Opinion of the Court, Filed July 24, 1936.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA.

In Equity.

No. 277.

THE GREAT ATLANTID & PACIFIC TEA COMPANY,

versus

ALICE LEE GROSJEAN, Supervisor of Public Accounts, *et al.*

Monroe & Lemann, Attorneys for Complainants and Intervenors.

Gaston L. Porterie, Attorney General of Louisiana; Justin C. Daspit, Fred A. Blanche and E. L. Richardson, Special Assistants to the Attorney General, Attorneys for Defendants.

Before Foster and Hutcheson, Circuit Judges, and Borah, District Judge.

BORAH, *District Judge:*

This controversy involves the validity of the chain store license statute of Louisiana. Complainant, an Arizona corporation which with its affiliates operates 106 stores in Louisiana and a total of 15,082 elsewhere in the United States and in Canada, initiated this proceeding by the filing of a class bill in which twelve other foreign corporations operating retail units in Louisiana intervened and became co-plaintiffs, praying that the tax officials be enjoined from enforcing the Act. The complainants challenge the statute as violative of the due process and equal protection clauses of the Fourteenth Amendment, of the corresponding provisions of the Constitution of Louisiana, and of the commerce clause of the Federal Constitution. Upon the filing of the bill a temporary restraining order was issued after notice, restraining the enforcement of the statute against

the complainants. The defendants agreed without prejudice to the ultimate rights of any party to the suit that it was proper for the matters involved to be held in statu quo until a hearing could be held on the merits, and accordingly an order for an interlocutory injunction was issued by a specially constituted District Court upon the case made out by the affidavits of complainant and intervenors to the original and intervening bills. The case was in due course set down for hearing and the matter is now before the Court for disposition on the merits.

The statute here under review, Act 51 of the Louisiana Legislature of 1934, was enacted pursuant to the provisions of Section 10, Article 8 of the Constitution of Louisiana for the year 1921, authorizing the legislature of Louisiana to levy license taxes, and providing that such license tax may be classified, graduated or progressive.

Section 1 of the Act provides:

> "Be it enacted by the Legislature of Louisiana, That because of the advantages accruing from the operation of multiple stores wherever situated, and because of the basic difference inherent in such character of operations, there be and is hereby levied an annual license tax for the year 1935 and for each subsequent year upon each person, firm, partnership, corporation or association of persons engaged in the business of operating, or maintaining, as part of a group or chain, any store or stores in this State, where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail under the same general management, supervision, ownership or control, commonly known as branch or chain stores."

Section 3 of the Act provides:

> "That the license tax for said business described in this Act levied upon the store or stores operated in the State of Louisiana shall be based on the number of stores or mercantile establishments included under the same general management, supervision, ownership or

control, whether operated in this State or not, and shall be fixed and graded as follows, to-wit:

(1) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of not more than ten stores, the annual license shall be Ten ($10.00) Dollars for each such store operated in this State.

(2) Upon stores • • • having a total of more than ten stores, but not more than thirty-five stores, the annual license shall be Fifteen ($15.00) Dollars for each such store • • •.

(3) Upon stores • • • having a total of more than thirty-five stores, but not more than fifty stores, the annual license shall be Twenty ($20.00) Dollars for each such store • • •.

(4) Upon stores • • • having a total of more than fifty stores, but not more than seventy-five stores, the annual license shall be Twenty-five ($25.00) Dollars for each such store • • •.

(5) Upon stores • • • having a total of more than seventy-five stores, but not more than one hundred stores, the annual license shall be Thirty ($30.00) Dollars for each such store • • •.

(6) Upon stores • • • having a total of more than one hundred stores, but not more than one hundred twenty-five stores, the annual license shall be Fifty ($50.00) Dollars for each such store • • •.

(7) Upon stores • • • having a total of more than one hundred twenty-five stores, but not more than one hundred fifty stores, the annual license shall be One Hundred ($100.00) Dollars for each such store • • •.

(8) Upon stores • • • having a total of more than one hundred fifty stores, but not more than one hundred seventy-five stores, the annual license shall be One Hundred Fifty ($150.00) Dollars for each such store • • •.

(9) Upon stores • • • having a total of more than one hundred seventy-five stores, but not more than two hundred stores, the annual license shall be Two Hundred ($200.00) Dollars for each such store • • •.

(10) Upon stores • • • having a total of more than two hundred stores, but not more than two hundred twenty-five stores, the annual license shall be Two Hundred Fifty ($250.00) Dollars for each such store • • •.

(11) Upon stores • • • having a total of more than two hundred twenty-five stores, but not more than two hundred fifty stores, the annual license shall be Three Hundred ($300.00) Dollars for each such store • • •.

(12) Upon stores • • • having a total of more than two hundred fifty stores, but not more than two hundred seventy-five stores, the annual license shall be Three Hundred Fifty ($350.00) Dollars for each such store • • •.

(13) Upon stores • • • having a total of more than two hundred seventy-five stores, but not more than three hundred stores, the annual license shall be Four Hundred ($400.00) Dollars for each such store • • •.

(14) Upon stores • • • having a total of more than three hundred stores, but not more than four hundred stores, the annual license shall be Four Hundred Fifty ($450.00) Dollars for each such store • • •.

(15) Upon stores • • • having a total of more than four hundred stores, but not more than five hundred stores, the annual license shall be Five Hundred ($500.00) Dollars for each such store • • •.

(16) Upon stores • • • having a total of more than five hundred stores, the annual license shall be Five Hundred Fifty ($550.00) Dollars for each such store • • •."

The bill alleges, and it is admitted, that the complainant is engaged in the business of selling groceries, fruits, vegetables, poultry, meats, cheese, eggs and other foods, meats and dairy products or goods commonly sold in grocery and meat stores, and has been so engaged for more than ten years. It operates under the same general management, supervision, ownership or control 15,082 stores, of which 14,800 are located in the United States and 282 are located in Canada. Of this number, 62 stores are located in the city of New Orleans and 44 stores are located at points in Louisiana outside the city of New Orleans, and it has capital invested in the State of Louisiana approximating half a million dollars.

The bill alleges that prior to the enactment of the 1934 statute, the tax imposed by the State of Louisiana upon chain stores was that established by Act 19 of the Louisiana Legislature of 1932. The Act of 1932, like the chain store tax statute of every other state in which such tax exists, provided for a classification based only upon the number of stores operated in the State and established ten classes comprising units of five each, and an eleventh class comprising all stores in excess of fifty. The tax upon stores in the last class under said Act was $200.00 per store; stores falling within the lower classes paying at lower rates according to number of stores in each class, the said rates ranging from $15.00 to $100.00 per store for stores less than fifty in number.

The bill charges that the purpose and effect of the 1934 statute was to reach operators of chains outside Louisiana so as to produce revenue for Louisiana by an extra-territorial tax and at the same time to discriminate in favor of local chains by reducing the rates applicable to a local chain and increasing the rates applicable to a foreign chain even though the local chain may operate far more extensively in the State than does the foreign chain. Thus H. G. Hill Stores, Incorporated, which is in direct competition with the complainant, The Great Atlantic & Pacific Tea Company, and operates in New Orleans more stores than does the complainant, is required under the Louisiana statute to pay for its eighty-seven stores $30.00 per store, whereas the

complainant has only sixty-three stores in New Orleans but each of said stores is required to pay a tax of $550.00.

In addition to the facts averred in the bill the complainants offered evidence to prove the following points:

Operations of chains doing business in more than one state vary greatly from section to section and from state to state because of differences in local conditions, economic and otherwise, freight rates added to cost, remoteness from headquarters and executive management, increase in difficulty of supervision, local competition and other factors.

Conditions as to sales and profits vary greatly in all classes of stores according to the section of the country in which they are located. In almost every case operations in Louisiana are less than average for all stores operated by the particular company.

In every important respect the operations of the complainant are the same as those of H. G. Hill Stores, Incorporated. The gross volume of the sales of the Hill Stores in New Orleans is very much greater; they have more stores and do more business per store than the stores of the Great Atlantic & Pacific Tea Company, and under the Statute they pay $30.00 per store, while complainant is required to pay a maximum of $550.00 per store on every store.

Other corresponding differentials are set forth to show that one of the purposes and effects of the Louisiana Statute is to discriminate in favor of a company which operates in Louisiana a larger number of units than a competitor which operates a smaller number of units in Louisiana, but a larger total number in the world.

With reference to the situation in Louisiana as of date February 10, 1936 the proof shows that complainant operated 109 stores of which 66 were in New Orleans; other food chains operated 197 stores; independent grocers operating under one general supervision and pooling their purchases operated 128 stores; and entirely independent grocers operated 2820 stores. The census reports further show that the number of chain stores in Louisiana is decreasing at a more rapid rate than the number of independent stores, and that the number of wholesale stores in Louisiana is actually increasing.

The defendants produced evidence to prove that the retail units operated in Louisiana by complainant and intervenors are part of a chain or system; that all the units of a retail chain contribute to the central purchasing power of the chain irrespective of state lines and location of stores and increases the per unit multiple advantages enjoyed by the operator of the system; that the greater the number of units in the chain, the greater the purchasing power, the greater the secret rebates and allowances, the greater the advantages in advertising, the greater the capital employed, the greater the social and economic consequences, and the lower the cost of distribution and overhead.

Testimony was also offered similar to that found in the original chain store tax case, State Board of Tax Commissioners of Indiana *v.* Jackson, 283 U. S. 527; 51 S. Ct. 540, establishing the difference in the type of operation between the operator of one store and the operator of many stores, and the difference in the type of operation, varying with the number of units, with additional reference to the difference in the method of operation of the Great Atlantic & Pacific Tea Company as compared with the H. G. Hill Stores.

In fine the record in this case shows the contribution to the advantages made by each unit in the chain, and the per unit advantage made possible by the whole system, and in that respect only does it differ materially from the proof which was before the court in the *Jackson* case. Indeed the only question presented here over and above that which received the consideration of the Court in State Board of Tax Commissioners *v.* Jackson, *supra;* Louis K. Liggett Company *v.* Lee, 288 U. S. 517, 53 S. Ct. 481; and Fox *v.* Standard Oil Company of New Jersey, 294 U. S. 87, 55 S. Ct. 333, is the method used by the Legislature of Louisiana in arriving at the rate of the tax per unit in Louisiana.

It is well settled under the authorities, *supra,* that there are differences and advantages in favor of large chains and for that reason the State may tax the large chains more heavily than the smaller ones, and upon a graduated basis. In the present case the State imposes a license or privilege tax, clearly within its authority, for the privilege of doing

business in Louisiana. The measure of that tax is the number of units in the chain in the State. The rate is determined by the number of stores in the entire chain. No property beyond the jurisdiction of the State is in any just sense taxed under the statute. The rate only is affected by units of the chain outside of Louisiana and these units are considered only for the purpose of determining the type of business done in Louisiana and the value of the privilege of operating each unit in the State. Where as here the power to tax exists, the extent of the burden is a matter for the discretion of the legislature. The wisdom of its exercise is not the concern of this Court.

Complainants further contend that the Louisiana statute does not represent any policy to protect, and was not designed to, and does not in fact protect independent merchants against chains, but establishes an arbitrary discrimination against chains operating in other States. "The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, American Sugar Rfg. Co. *v.* Louisiana, 179 U. S. 89, or if any state of facts reasonably can be conceived to sustain it. Rast *v.* Van Deman & Lewis Co., 240 U. S. 342; Quong Wing *v.* Kirkendall, 223 U. S. 59." Fox *v.* Standard Oil Co., *supra*. The statute here assailed classifies chain stores in accordance with the economic advantages which they possess and gives recognition to the basic differences of their operations. It imposes a license tax for the privilege of operating retail units in multiple form reasonably adjusted in amount with regard to substantial differences in the value of the privilege exercised. The classification is neither arbitrary nor capricious. The statute treats upon a similar basis all owners of chain stores similarly situated. In the light of what we have said this is all that is required by the equal protection clauses of the Federal and State Constitutions.

What has been said in respect of the contention that the tax establishes an arbitrary discrimination against chains operating in other states is a sufficient answer to the contention that property has been taken without due process of law.

It is asserted on behalf of the intervenors, Montgomery Ward & Company, Incorporated, and Sears-Roebuck & Company that the tax is invalid (1) because it is levied for the privilege of operating stores conducting both interstate and intrastate business and the tax is not divisible in accordance with the respective amounts of intrastate and interstate business transacted, (2) because it is levied for the privilege of carrying on Louisiana business and is partly measured by interstate operations carried on wholly outside the State of Louisiana. The claim does not merit serious consideration. The statute by its express terms applies only "where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail."

The order heretofore entered granting an interlocutory injunction is recalled, and the decree for injunction denied, and the bill of complaint dismissed. Appropriate orders may accordingly be entered.

New Orleans, Louisiana. July 24, 1936.

(8601-C)

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Supreme Court of the United States

OCTOBER TERM 1936.

No. 652.

GREAT ATLANTIC AND PACIFIC TEA COMPANY, *et al.*,
Appellants,

against

ALICE LEE GROSJEAN, Supervisor of Public Accounts, State of Louisiana, *et al.*,
Respondents.

BRIEF FOR APPELLANT, F. W. WOOLWORTH CO.

MARTIN A. SCHENCK,
WILLIAM J. CARR,
Solicitors for Appellant,
F. W. Woolworth Co.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM 1936.

GREAT ATLANTIC AND PACIFIC TEA COMPANY, *et al.*,
Appellants,
against
ALICE LEE GROSJEAN, Supervisor of Public Accounts, State of Louisiana, *et al.*,
Respondents.

No. 652

BRIEF FOR APPELLANT,

F. W. WOOLWORTH CO.

F. W. Woolworth Co., an intervenor party plaintiff (R. p. 33) appeals from a final decree of a three judge court which dismissed a complaint brought to enjoin the Louisiana Chain Store Act (No. 51-1934) and which held the act valid and not a violation of the Constitution of the United States (R. p. 273). The opinion below is reported in 16 F. Supp. 499.

Jurisdiction.

The appeal is by virtue of Section 238 of the Judicial Code, and probable jurisdiction has been noted on February 1, 1937.

Statement.

The act complained of recites (Sec. 1) "that because of the advantages accruing from the operation of multiple stores wherever situated, and because of the basic difference inherent in such character of operations", the license tax (Sec. 3) "levied upon the store or stores operated in the State of Louisiana shall be based on the number of stores or mercantile establishments included under the same general management, supervision, ownership or control, whether operated in this state or not, and shall be fixed and graded as follows":

> (Then follows sixteen separate paragraphs wherein is provided a graduated tax from $10 per store to $550 per store, depending upon the total stores wherever operated, from 1 store to 500 or more stores.)

The complaint alleges in regard to the plaintiff's business that a substantial portion of its merchandise is bought in other states and is shipped to the plaintiff in Louisiana and sold by plaintiff at retail, in many cases in the original package (R. p. 3).

The defendants' answer asserts (as justification for the tax) greater advantages accruing to operators of chain stores in purchasing direct from manufacturers and states that it was the purpose of the statute "to some extent to place the independent retailer and the small chain operator, through taxation, on a parity with those operating a vast number of units backed by unlimited capital" and in so doing, "to protect the citizens of Louisiana and promote their general welfare" (R. p. 43). The answer alleges that it is the policy of chain organizations to supply all the multiple units by a central buying unit (R. p. 50) and asserts "the superior ability of the larger chains to absorb the tax by reason of operating nationally" and by spreading "the tax imposed upon its local units over its many stores locally, as

well as nationally" and by recovering the resultant decrease in profits by "charging higher prices for commodities in stores located in other territory" (R. p. 62).

In regard to F. W. Woolworth Co., the merchandise is listed to the store by the Woolworth buyer; it is ordered by the store direct from the manufacturer; it is shipped directly to the store by the manufacturer and it is charged to the store by the company at the prices paid by the company to the manufacturer. The store pays the charges for shipment of all merchandise to it. These charges are added to the cost of the merchandise in each particular store (R. p. 177).

F. W. Woolworth Co. is a New York corporation and on January 1, 1935 operated 1811 stores located in the United States, 37 in Canada, 8 in Cuba, and 81 in Germany (R. p. 267).

The Louisiana operations of F. W. Woolworth Co. for the year 1932 showed a loss, and for the years 1930-1934 showed earnings of the Company in Louisiana substantially less than its earnings outside of Louisiana. The records of F. W. Woolworth Co. indicate that in the year 1934 the Louisiana net income per store was about half the average of the income per store of the stores in the St. Louis District, which comprises 189 stores in eleven different states, including Louisiana. This was due to the more unfavorable conditions of operations in Louisiana (R. pp. 171-172).

The Court below has found:

> "Operations of chains doing business in more than one state vary greatly from section to section and from state to state because of differences in local conditions, economic and otherwise, freight rates added to cost, remoteness from headquarters and executive management, increase in difficulty of supervision, local competition and other factors. Conditions as to sales and profits vary greatly in all classes of stores according to the section of the country in which they are located. In almost every case operations in Louisiana are less than average for all stores operated by the particular company" (R. p. 266).

Specification of Errors.

This appellant urges the assignments of error printed at page 275 et seq. of the Record and urges particularly that the Court below erred, in refusing to hold that the statute violates the Fourteenth Amendment of the United States in taxing property and operations beyond the jurisdiction of the State (assignment No. 1, R. p. 276) and is invalid because it burdens and interferes with interstate commerce (assignment No. 11, R. p. 277).

Summary of Argument.

The tax, within the recent decisions of this Court, is purely arbitrary, having no relationship to values.

The tax is upon operations exterior to Louisiana and constitutes a burden on interstate commerce.

POINT I.

The Tax Act is unjustifiably unequal and arbitrary. The increase in the rate has no relationship to the values or rights taxed.

In the case of F. W. Woolworth Co., the tax rate upon each of its stores within Louisiana is controlled by the number of stores it operates in Germany, in Canada, as well as in the United States. The tax does not purport to be controlled or influenced by value of property within Louisiana or by value or extent of rights exercised in Louisiana. On the contrary it in terms is based on "advantages" from operation of stores outside Louisiana. And these "advantages", arbitrarily determined by number of store locations outside the state boundary, control whether the tax is to be $10 per store or $550 per store in Louisiana.

In *Liggett Co.* v. *Lee*, 288 U. S. 517, this same "boundary" characteristic of a chain store act was held to be arbitrary and discriminatory. The graduated scale applied to all stores within a single county but if a store were added outside the county, the license fee for each was materially increased. This Court, at page 534, said:

> "There is no more reason for adopting the county line as the measure of the tax than there would be for taking ward lines in cities or arbitrary lines drawn through the state regardless of county boundaries."

The drawing in the case at bar of a state boundary as the measure of the tax involves other elements of invalidity, but, it would seem, is here of the same character of arbitrariness as has been recently passed upon by this Court in respect of county boundaries. In fact the extreme of arbitrariness is here reached for the additional stores give the presumed "advantages" as the basis for increasing the rate, whether they are just across the state line or in Canada.

In *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, the Kentucky Gross Sales Tax required every retail merchant to pay an annual license tax for operating any store within the State determined by computing the tax on gross sales graduated on the amount of sales. This Court held that such classification denied the equal protection of the laws assured by the Fourteenth Amendment. It stated that the statute operated to take as the tax a percentage of every dollar due or paid on every sale but increased the percentage if the sale which was the occasion of the tax, succeeds the consummation of other sales of a specified aggregate amount. The Court stated that the operation of the statute was unjustifiable, unequal, whimsical and arbitrary and pointed out that the gross sales of a merchant did not bear a constant relation to his net profits and that the

graduated rates imposed were not intended to bear any relation to net profits.

The present tax act is even more arbitrary, in the distance which openly separates it from any consideration of values within Louisiana and in the purely mathematical character of its graduation on stores beyond the boundary of Louisiana.

POINT II.

The Act is a regulation of and a tax upon business beyond the jurisdiction of the State of Louisiana, and constitutes a burden upon interstate commerce.

In *Wallace* v. *Hines,* 253 U. S. 66, the Act of North Dakota levied an excise tax on that portion of a railroad's stocks and bonds as its mileage within the State bore to its entire mileage both within and without the State.

This Court, per Holmes, J., at page 69, said:

> "The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart —not, in other words, to open to taxation what is not within the State. Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State. Hence the possession of bonds secured by mortgage of lands in other States, or of a land-grant in another State or of other property that adds to the riches of the corporation but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax—whatever it may be—whether a tax on property, or, as here, an excise upon doing business in the State."

This rule, in the case at bar, has been violated. The tax is here because of "*advantages* accruing from the operation of multiple stores *wherever situated.*" The thing taxed and its location and the elements which govern the amount of the tax are all outside Louisiana. No attempt has been made to arrive at true value of the things within the State. The State has not here sought by consideration of value of the entire system to arrive at a fair ratio to thus determine fair value of the right to transact business within its borders; for here the very graduation from $10 to $550 depends on ignoring any ratio of values but following pure numerology in matters beyond state borders.

The purposes of such anti-chain store acts (as reviewed by Brandeis, J. dissenting in *Liggett Co.* v. *Lee*, 288 U. S. 517) when read into this statute reveal the astounding extent to which the State has here attempted to project its regulatory legislation into other States.

In *Looney* v. *Crane Co.*, 245 U. S. 178, the Crane Co., an Illinois corporation, carried on its business of manufacturing and dealing in hardware, etc. not only in Illinois but in other states by shipment of merchandise on orders obtained and sent to Chicago for execution. The Company moreover established agencies in other states to which goods were shipped from Chicago and other points and from which agencies the goods were sold. Texas enacted a statute permitting foreign corporations to do business at a minimum charge of $25 based upon $100,000 of capital stock and also levied a franchise tax on foreign corporations calculated (under the Act of 1907) upon the aggregate of the amounts of capital stock plus surplus and undivided profits. In the same year there was also enacted a law vastly increasing the amount of the permit tax. This Court affirming an interlocutory judgment against the enforcement of the statutes, at pages 187, said:

> "It may not be doubted under the case stated that intrinsically and inherently considered both the permit tax and the tax denominated as a franchise tax

> were direct burdens on interstate commerce and moreover exerted the taxing authority of the State over property and rights which were wholly beyond the confines of the State and not subject to its jurisdiction and therefore constituted a taking without due process."

The Court further, at page 188, said:

> "Indeed the cases referred to were concerned in various forms with the identical questions here involved and authoritatively settled that the States are without power to use their lawful authority to exclude foreign corporations by directly burdening interstate commerce as a condition of permitting them to do business in the State in violation of the Constitution, or because of the right to exclude to exert the power to tax the property of the corporation and its activities outside of and beyond the jurisdiction of the State in disregard, not only of the commerce clause, but of the due process clause of the Fourteenth Amendment."

In the case at bar, the "advantages accruing from the operation of multiple stores wherever situated" which cause the tax and which are the things taxed, consist mainly in economies in buying goods outside the State and in economies of transportation of such goods into the State. And this economy of source and direction (of what is necessarily interstate commerce) is officially asserted as the advantage justifying the tax (Defs.' ans. R. p. 43). The tax even more clearly than in *Looney* v. *Crane* (supra) is a direct burden on interstate commerce. Here the burden is arbitrarily graduated and increased with the extent of those beyond-boundary advantages of operation in respect of goods coming into the state for sale.

In *Baldwin* v. *Seelig*, 294 U. S. 511, it was held that the New York Milk Control Act could not be applied against a dealer who had acquired title to milk as a result of a transaction in interstate commerce, this Court, per Cardozo, J., at 521, saying:

> "Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported."

This Court further said, page 522:

> "Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states." • • •
>
> "If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."

This Court further, at page 527, said:

> "What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place or origin. They are thus hostile in conception as well as burdensome in result."

In the case at bar the erection of barriers against interstate competition is intended. For the local retailer, through taxation, is intended to be placed on a parity in competition with the foreign corporation which will be compelled to absorb the tax by operating nationally and by charging higher prices for commodities in stores located outside the state (Defs.' ans. R. pp. 43, 62, 63).

Here the occupation tax for the privilege of conducting the local business has in terms been increased because of the business done beyond the boundaries of Louisiana. The graduation of the tax, against the advantages of operation has the clear and unmistakable purpose and effect of burdening the interstate business.

Cooney v. *Mountain States Telephone & Telegraph Co.*, 294 U. S. 384.

POINT III.

The decree below should be reversed and a decree should be directed enjoining the enforcement of the Act.

Respectfully submitted,

MARTIN A. SCHENCK,
WILLIAM J. CARR,
Solicitors for Appellant,
F. W. WOOLWORTH CO.

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No. 652

Supreme Court of the United States

OCTOBER TERM, 1936

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, ET AL.,

Appellants,

v.

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS, ET AL.,

Appellees.

On Appeal from the District Court of the United States for the Eastern District of Louisiana.

BRIEF FOR APPELLANTS

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HAUSER PRINTING CO., NEW ORLEANS

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No. 652

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ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS, ET AL.,

Appellees.

On Appeal from the District Court of the United States for the Eastern District of Louisiana.

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the District Court of the United States for the Eastern District of Louisiana is reported in 16 F. Supp. 499 under the style of "Great Atlantic & Pacific Tea Company vs. Grosjean, Supervisor of Public Accounts, et al," and appears in the Record at page 256.

JURISDICTION

As this is a suit to restrain the enforcement of a

statute of the State of Louisiana, this Court has jurisdiction of an appeal taken directly from the decree of the three-judge Court, which sat below, by virtue of the provisions of Section 238 of the Judicial Code as amended, 28 USCA 345. Probable jurisdiction of the appeal was noted by this Court on February 1, 1937.

STATEMENT OF THE CASE

This case involves a new and far reaching idea in chain store taxation, which, if maintained, opens the door to the application of a similar theory to franchise, income and other taxes. The Louisiana statute the validity of which is challenged calculates taxes upon stores "or mercantile establishments" in Louisiana by reference to the number of stores "or mercantile establishments" operated under the same management, ownership or control within or without the borders of Louisiana, anywhere in the world. This is Act 51 of the Louisiana Legislature of 1934, a copy of which is printed in the appendix to this brief. The statute and the theory upon which it goes is without precedent. The importance of the case goes far beyond Louisiana. Since this suit was filed similar laws have been proposed for passage in several other states and in at least one city. It has been said that if the Louisiana statute is upheld and widely followed, "the era of the national chain is over" (49 Harvard Law Review 781). It may perhaps also be said that in that event the era of national corporations and also of firms or individuals doing business in more than one state is also over. Every state following the Louisiana statute may erect an economic barrier along its borders which would confine business within its own limits and exclude those doing business elsewhere. The Louisiana statute is not confined in its operations to corporations, but applies also to firms and individuals.

Many other states have statutes levying special taxes against chain stores, but all such statutes are based solely upon the number of units operating within the state. Louisiana previously had a statute of this character (Act 19 of 1932), of which a copy also appears in the appendix to this brief. The effect of the 1934 statute, the validity of which is challenged in this case, was to enormously increase the rate of taxes on chains doing business in other states and to greatly reduce the rate of taxes on chains doing business only in Louisiana.

The original bill of complaint to enjoin the enforcement of the 1934 statute was brought by The Great Atlantic & Pacific Tea Company. Intervening bills were filed by twelve other corporations affected by the Louisiana statute. A temporary restraining order was issued after notice. By agreement of counsel an order for an interlocutory injunction was issued by a duly constituted three-judge court. The record was made up in accordance with a stipulation entered into by counsel (R. 81-87) which reserved all objections to the competency of testimony upon any ground other than form. The three-judge court on July 24, 1936 entered a final decree, denying the application for a permanent injunction and dismissing the bill of complaint. Findings of fact and conclusions of law were made substantially in accordance with the recitals in the opinion (R. 263). The order granting the appeal continued the interlocutory injunctions in effect until the final determination of the case in this Court (R. 279).

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

The assignment of errors, all of which will be urged, will be found in the record at page 275. The following is

a summary of the points under which appellants' contentions may be grouped:

The challenged Louisiana statute violates the Fourteenth Amendment to the Constitution of the United States by taxing property and operations beyond the jurisdiction of the State.

The challenged statute is void because it requires one operating a store or mercantile establishment in Louisiana to pay increased taxes to Louisiana by virtue of what is done outside Louisiana. It goes so far as to require one who actually **decreases** operations **within** Louisiana to pay **increased** taxes to Louisiana because of what is done **outside** Louisiana.

The Louisiana statute is especially arbitrary in taxing operations outside Louisiana irrespective of the remoteness of those operations and of their character and connection with operations within Louisiana, and in proceeding upon the theory that mercantile establishments are fungible and that all establishments everywhere are of the same character and value.

The Louisiana statute does not represent any policy to protect, and was not designed to and does not in fact protect, independent merchants against chains. It imposes upon the complainant and each of the intervenors a rate of tax for what is done in Louisiana far exceeding the rate imposed upon competitors operating more units and doing greater business in Louisiana, and thereby denies to complainant and intervenors the equal protection of the laws.

The statute cannot be maintained without conceding to the State of Louisiana a corresponding power in other forms of taxation, such as income, franchise and sales tax-

es, the effect of which would be to permit the State to erect economic barriers along its borders and, by discriminatory taxation, to exclude those engaged in operations elsewhere.

The challenged Louisiana statute burdens and interferes with interstate commerce and particularly so in its application to the mail order business of intervenors Montgomery Ward & Company and Sears Roebuck & Company.

Provisions of Challenged 1934 Statute

By Section 2 of Act 51 of the Louisiana Legislature, 1934 it is provided:

> "That because of the advantages accruing from the operation of multiple stores wherever situated, and because of the basic difference inherent in such character of operations, there be and is hereby levied an annual license tax for the year 1935 and for each subsequent year upon each person, firm, partnership, corporation or association of persons engaged in the business of operating, or maintaining, as part of a group or chain, any store or stores in this State, where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail under the same general management, supervision, ownership or control, commonly known as branch or chain stores."

Section 3 of said Act provides:

> "That the license tax for said business described in this Act levied upon the store or stores operated in the State of Louisiana shall be based on the number of stores or mercantile establishments included under the same general management, supervision, ownership or control, whether operated in this State or not, and shall be fixed and graded as follows, to-wit:"

Here follows a schedule of rates in sixteen separate steps or brackets imposing taxes upon the classes and at the rates as follows:

Rates Under 1934 Statute

Bracket	*Total Stores and Mercantile Establishments Operated everywhere*	*Tax on Louisiana Stores and Mercantile Establishments*
1	1 to 10	$ 10.00 per store
2	11 to 35	15.00 " "
3	36 to 50	20.00 " "
4	51 to 75	25.00 " "
5	76 to 100	30.00 " "
6	101 to 125	50.00 " "
7	126 to 150	100.00 " "
8	151 to 175	150.00 " "
9	176 to 200	200.00 " "
10	201 to 225	250.00 " "
11	226 to 250	300.00 " "
12	251 to 275	350.00 " "
13	276 to 300	400.00 " "
14	301 to 400	450.00 " "
15	401 to 500	500.00 " "
16	Over 500	550.00 " "

The following table summarizes the number of establishments operated by the parties to this suit everywhere, the number of stores operated in Louisiana, the tax rate per establishment under the 1934 statute and the tax rate per establishment which would be applicable under the statute if only the Louisiana stores were used as the basis for determining the rate of tax.

Name	Kind of Business	Establishments Everywhere	Establishments in Louisiana	Tax Per Establishment Under 1934 Act	Tax Per Establishment if Based Only on Stores in Louisiana
The Great Atlantic & Pacific Tea Company	Grocery & Meat	15,084	106	$550	$50 (R. 264)
Consolidated Millinery Co.	Leased Millinery Departments	217	5	250	10(R.98-101,268)
W. T. Grant Company	Ltd. Price Variety Stores	465	5	500	10 (R. 102, 268)
H. L. Green Company	Ltd. Price Variety Stores	127	1	100	None(R.113,266)
G. R. Kinney Co.	Shoes	330	3	450	10 (R. 268)
Liggett Drug Co.	Drugs	452	6	500	10 (R. 267)
Montgomery, Ward & Co.	Mail Order, Dept. & Other Type Establishments	517	5	550	10 (R. 266)
J. J. Newberry Co.	Genl. Mdse.	431	2	500	10 (R. 144)
J. C. Penney Co.	Genl. Mdse.	1,474	8	550	10 (R. 268)
Scott Burr Stores Corp.	Ltd. Price Variety Stores	135	3	100	10 (R. 268)
Sears, Roebuck & Co.	Mail Order, Dept. & Other Type Establishments	436	4	500	10 (R. 267)
Wohl Shoe Co.	Leased Shoe Departments	232	6	300	10 (R. 168-a)
F. W. Woolworth Co.	Ltd. Price Variety Stores	2,634	14	550	15 (R. 170,267)

This table illustrates the controlling effect which the 1934 Louisiana statute gives to foreign establishments in fixing the tax rate. In some instances over 95% of the total tax results from the effect given to establishments outside the State.

The purpose and effect of the 1934 statute was to reach operations of chains outside Louisiana **so as to produce revenue for Louisiana by an extra-territorial tax and at the same time to discriminate in favor of local chains** by reducing the rates applicable to a local chain and increasing the rates applicable to a foreign chain even

though the local chain may, and in many instances does, operate far more extensively in the State than does the foreign chain. The inference appears quite clear upon the record that except for the discrimination which it established in favor of local chains and except for the active efforts of the local chains, the Louisiana statute of 1934 would not have been passed.

The Challenged Statute Compared with the Prior 1932 Statute

The Louisiana statute of 1932, like every other chain store statute, provided for the calculation of rates upon the basis of stores situated within the state. The units in Louisiana were grouped into brackets and each group took a different rate (R. 264). The law was not retrogressive. The following table shows the brackets and rates of the 1932 statute:

Bracket	*Total Stores In Louisiana*	*Tax per Store*
1	1 to 5	$ 15.00
2	6 to 10	25.00
3	11 to 15	30.00
4	16 to 20	40.00
5	21 to 25	50.00
6	26 to 30	60.00
7	31 to 35	70.00
8	36 to 40	80.00
9	41 to 45	90.00
10	46 to 50	100.00
11	Above 50	200.00

Complainant, The Great Atlantic & Pacific Tea Company paid under the 1932 statute only $15 per store on units up to 5. The tax was increased by $5 for every additional bracket of 5 stores until the number of units reached 50, after which the tax became $200.

The total increase in taxes effected by the 1934 statute is indicated by the following table which shows the total taxes payable by complainant and intervenors under the

1934 Louisiana statute as compared with the taxes payable by them under the 1932 statute. In this table complainant is referred to as Company A, and the intervenors are referred to under succeeding letters corresponding to the alphabetical order of their respective names:

Company	Stores and Establishments in Louisiana	Tax Payable under 1932 Statute	Tax Payable under 1934 Statute
A	106	$14,000	$58,300
B	5	75	1,250
C	5	75	2,500
D	1	None	100
E	3	45	1,350
F	6	100	3,000
G	5	75	2,750
H	2	30	1,000
I	8	195	4,400
J	3	45	300
K	4	60	2,000
L	6	100	1,800
M	14	320	7,700

This table illustrates the extent to which the 1934 Louisiana statute taxes the plaintiff and intervenors by virtue of their operations outside the State. Companies B, C and G each have 5 stores in Louisiana, but Company B pays Louisiana taxes of $1,250, while Company C pays $2,500, or twice as much, and Company G pays $2,750. Company F and Company L each have 6 stores in Louisiana, but Company F pays Louisiana $3,000, while Company L pays only $1,800. Company E and Company J each have only 3 stores in Louisiana, but Company E pays Louisiana $1,350 while Company J pays only $300.

Effect of Louisiana Statute Upon Chains Operating Solely or Chiefly In Louisiana

The following table illustrates the effect of the 1934

Louisiana statute in lowering the taxes upon certain chains operating solely or chiefly in Louisiana:

Name of Company	Total Stores	Stores in Louisiana	Tax Under 1932 Statute	Tax Under 1934 Statute
Hill Stores	87	87	$10,200	$2,610
Katz & Besthoff, Ltd.	10	10	200	100
Morgan & Lindsey	45	28	980	355

It will be noted that the 1934 statute reduced the taxes of Morgan & Lindsey almost **two-thirds**, cut in **half** the taxes of Katz & Besthoff, Ltd. and reduced by **seventy-five per cent** the taxes of Hill Stores.

Evidence As To Operations of Complainant and Intervenors

The Great Atlantic & Pacific Tea Company (R. 85-98) and its affiliated companies operate in the United States 14,705 retail units and in Canada 279 units. In Louisiana the number of units operated as of March 2, 1935 was 106, of which 63 were in the City of New Orleans. Outside Louisiana the units were scattered through 38 states, the District of Columbia and Canada. The stores in various sections of the country vary as to the character of merchandise, depending upon local tastes and customs, standards of living and other factors. Each store must be designed in size, character and nature of the merchandise to meet the conditions in the trading area in which it is located. Similarly there is a wide variation in store operating results due to the effect of many local factors including consumers' purchasing power, expense of operation, price levels in the community, local laws and taxes, population in trading area, competency of personnel, etc. Foodstuffs that sell in some parts of the country are not desired in other sections and from locality to

locality there is a variation in items which must be stocked and can be sold. The stores vary widely in amount of sales and profits and there is no consistent ratio between sales and profits in the various stores either from year to year or from section to section. The number of items sold varies from approximately 800 items in some stores to approximately 1250 items in other stores where meat is not sold. In combination stores the number of items varies from approximately 1150 to approximately 1800. The number of employes per store varies from 1 regular employe in some stores to 20 in other stores with a few stores having substantially more employes. The annual sales per store vary from about $13,500.00 to over $125,000.00 and the sales of a few stores, all outside Louisiana, run very much higher, one store having sales of over $800,000.00 per year. In Louisiana, the total sales per store were approximately as follows, the years being the Company's fiscal years:

1931	$49,000.00
1932	38,000.00
1933	38,000.00
1934	42,000.00

The average sales per store in 1934 for stores everywhere was almost $55,000.00.

In Louisiana, the net profits per store after expenses and taxes (including U. S. income taxes) were approximately as follows:

1931	$390.00
1932	290.00
1933	550.00
1934	770.00

In the year 1934, the net profits per store of all the stores was approximately $1000.00.

In New Orleans, the operations of the plaintiff are in every important respect the same as those of H. G. Hill Stores, Inc. which operates 87 stores in New Orleans as against 63 operated by the plaintiff. The Atlantic & Pacific Stores and the Hill Stores carry about the same lines of merchandise and their merchandising methods are practically the same, though Hill Stores advertise more extensively than does the Atlantic & Pacific. The gross volume of the sales of the Hill Stores in New Orleans is very much greater than the gross volume of the plaintiff's stores. The Hill Stores have more locations and the majority of the stores do more business per store than the stores of the Atlantic & Pacific. In many cases, Hill and Atlantic & Pacific have a store in the same square and in most of such cases the Hill Store in the square sells more goods than the A. & P. store in that square. The figures as to gross sales reported for the purposes of general license taxes by Hill and A. & P. show that in 1934, in **27 cases out of 30, where A. & P. and Hill have stores in the same block or within a block of each other, each Hill store does a materially larger volume of business than the neighboring A. & P. store.** In 1933, similar figures show only 1 case out of 28 in which an A. & P. store situated within a square of a Hill store did more business than the Hill store. **In 1934, the Hill Stores in New Orleans reported aggregate gross total sales having a maximum of $5,515,000.00 as against a corresponding figure of $1,225,000.00 for the A. & P. In 1933 the corresponding figures were $4,716,000.00 for Hill and $1,860,000.00 for A. & P.**

The Hill Stores under the Louisiana statute pay $30 per store, while A. & P. is required to pay a maximum of $550 per store on every store. The extent of the discrim-

ination established by the tax is illustrated by the fact that the average rental paid by the A. & P. in New Orleans for a store is $77 per month, or $924 per year, while the discrimination in tax between A. & P. and Hill amounts to $520 per store or well over half a year's rental.

As of February 10, 1936 the A. & P. operated 109 stores in Louisiana, of which 66 were in New Orleans and 9 were in Shreveport. In the towns in Louisiana in which the A. & P. operate, other food chains operate 197 stores; independent grocers operating under one general supervision and pooling their purchases operate 128 stores; and entirely independent grocers operate 2,820 stores.

Liggett Drug Company, Inc., (R. 125-135) a Delaware corporation and its subsidiaries operate 452 stores situated in 32 states and the District of Columbia, of which 6 stores are located in Louisiana, 3 being in New Orleans and 1 each in Shreveport, Baton Rouge and Alexandria. In New Orleans the Liggett stores are in direct competition with three local chains, and in Shreveport, they are in competition with one local chain. One of the local chains, Katz & Besthoff, Ltd. operates 10 stores in the State of Louisiana, or almost twice as many as Liggett. All the Katz & Besthoff stores are in New Orleans. Under the Louisiana statute, each of the 10 Katz & Besthoff stores is required to pay a chain store license tax of $10 per store, while the Liggett Company is required to pay $500 for each of its 6 stores. Katz & Besthoff maintain much larger inventories and have much larger warehouse facilities than Liggett's stores in Louisiana or any comparable Liggett stores elsewhere. Katz & Besthoff reported for general mercantile license tax purposes for the City of New Orleans for the year 1934 aggregate minimum sales of $1,225,000 and aggregate maximum sales of

$1,775,000 as compared with Liggett's aggregate minimum sales of $216,000 and aggregate maximum sales of $260,000.00. The Liggett store at 840 Canal Street in 1934 had a sales volume not exceeding $110,000, while the Katz & Besthoff store right across the street at 841 Canal Street, had an aggregate sales volume not exceeding $345,000. The Liggett Store at 1001 Canal Street reported sales at not exceeding $85,000, while the Katz & Besthoff store at 732 Canal Street, three blocks away, reported sales not exceeding $205,000. The Liggett Store at 200 St. Charles Street reported sales not exceeding $65,000, while the Katz & Besthoff store, two blocks away at 235 Carondelet Street, reported sales not exceeding $85,000. Katz & Besthoff, Ltd. buy in large quantities so that they are able to get the same discounts as Liggett and **buy as cheaply as Liggett.** In the drug trade, quantity discounts do not become any greater after a certain point is reached. Usually the maximum quantity discount would be obtainable in purchasing in gross lots, and one purchasing 1000 gross would get no better discount than one purchasing 100 gross. Katz & Besthoff, Ltd. sell at the same prices as Liggett. Katz & Besthoff, Ltd. themselves manufacture and put up and sell under their own names a large number of items on which they make a special profit, and their profit on such items is as large as Liggett's profits on items on which Liggett has the exclusive agency in Louisiana, if not larger. Katz & Besthoff, Ltd. have the advantage of local acquaintance and contact and close personal supervision and management. Liggett is subjected to considerable expense for supervision which is not required by Katz & Besthoff, Ltd., and the direct management of the owners residing in Louisiana is not only cheaper but more efficient and effective. Katz & Besthoff drug stores are organized and operated as effectively as any drug chain can

be. They have every advantage of quantity buying, buying for cash and obtaining cash discounts, skill in buying, stock in stores, warehousing of goods, supply of capital, pricing and sales policy, accounting methods, uniformity in store management, display and advertising and standardization which Liggett or any other chain has or could have. In addition, they have the great advantage of being a local institution.

Approximately 25% of Liggett's sales in Louisiana are soda fountain sales, including sandwiches. Approximately 85% of the supplies for this business are bought locally, the ingredients being ice cream, milk, bread, meat, etc. Katz & Besthoff, Ltd. and the other local drug chains do a larger soda fountain business than does Liggett and buy supplies locally in larger quantities.

The net income of the 6 Liggett stores in Louisiana in 1934, after deducting Federal taxes, was $17,725. The net income in that same period of Katz & Besthoff's stores was not known to witnesses for the intervenor, but could be ascertained from the State of Louisiana income tax returns filed with the defendant Supervisor and known to her.

Economical Drug Stores, Inc. is a local chain which operates 15 drug stores in the city of New Orleans in direct competition with Liggett. They also have the advantage of large purchasing power and chain store organization, and obtain the best quantity discounts and enjoy the advantage of local management and supervision. These circumstances also apply to American Drug Company, Inc., which operates 5 drug stores in the city of New Orleans, and Morris and Dickson Company, which operates 2 stores in Shreveport.

In 1934 Liggett's net percentage of earnings on sales in Louisiana was .0296 cents per dollar of volume. This percentage was exceeded by the earnings in the States of Alabama, Mississippi and Florida in the Southern territory and is very closely followed by the State of Georgia. In seven other states and the District of Columbia the percentage of profit exceeded the percentage of profit in Louisiana. In eleven other states, in which there were profits in 1934, the percentages of profit were lower than in the State of Louisiana, while in ten other states no profits were made. A comparison of percentages in twenty-three states and the District of Columbia, in which the stores operated at a profit, shows Louisiana to be twelfth in the percentage of earnings per dollar of sales.

Many circumstances enter into the percentage of profits depending upon the conditions prevailing in different cities and states, such as competitive conditions, including the number of competing stores and type of competition, desirability and character of the location, type of neighborhood or community, kind and quality of merchandise generally used and sold in such community or neighborhood. The major factor is the financial and employment conditions existing in each city. The type and character of the business done is also important; for example, the gross profit in the sale of cigars and cigarettes is extremely small, and in those stores in which these items furnish a large proportion of the business, the percentage will be lower than the percentage of the stores in which the bulk of the business is in other items. The State of Louisiana and the cities in Louisiana have a number of varied and different kinds of licenses and taxes, and the taxes and license fees paid by the Liggett Drug Company in Louisiana (not including any chain store tax)

exceed the average of taxes paid in other states and cities.

Montgomery Ward & Co., (R. 136-143), an Illinois corporation, operates 9 mail order establishments engaged in filling orders received from all parts of the United States and foreign countries through the mail. None of these mail order establishments is situated in Louisiana. The Company has also 19 order offices, consisting of display room where no stocks are carried but catalogues and samples are displayed and orders taken for forwarding to the mail order establishments for acceptance and direct shipment to the customer. None of these mail order offices is located in Louisiana, but orders to be filled by mail are taken at the 5 retail stores in Louisiana. The Company operates 489 retail stores, which are of different character and comprise:

(a) 17 department stores designated as Class "A" stores carrying a complete line of general merchandise. None of these stores is located in Louisiana. In the fiscal year ending January 31, 1935, these stores had average sales of $1,271,118 per store.

(b) 456 retail stores of limited size carrying a limited line of merchandise, designated as Class "B" stores, located in 45 states, which during the fiscal year ending January 31, 1935, had average sales of $251,287 per store. 5 of these stores are located in the State of Louisiana and had average sales in 1934 of $184,803. No one of these five stores operated at a profit, and the average net loss per store for these 5 stores was $12,935. In the adjoining state of Arkansas in 1934, the Company operated 5 Class "B" stores, which had average sales of $166,646 and showed an average loss of $2,818 per store.

(c) 16 small stores devoted exclusively to the sale

of hardware, household appliances, automobile tires and tubes, respectively located in 10 states, all designated as Class "C" stores. Said stores during the fiscal year ending January 31, 1935 had average sales of $77,664 per store. None of these stores is located in the State of Louisiana.

The following is a summary in tabular form of the foregoing statement showing the wide differences in the character and extent of operations of Class A, Class B and Class C stores:

Type of Store	*Average Annual Sales*
Class A stores	$1,271,118.00
Class B stores	251,287.00
Class C stores	77,664.00

The differences in the character and extent of operations are even greater with respect to mail order establishments. In Louisiana the Company has only 5 Class B stores whose average sales in 1934 were $184,803.00.

The 5 Louisiana stores are operated as branches of and agents for the mail order establishment operated by the Company at Ft. Worth, Texas. Mail order catalogues are displayed at such stores, and the orders of customers are taken and transmitted to the mail order establishment, which ships the merchandise direct to the customer. During the fiscal year ending January 31, 1935, total mail orders received by and transmitted from the Louisiana stores to Ft. Worth aggregated $35,233.52. The Louisiana stores also act as agents for the Ft. Worth mail order establishment in accepting orders for merchandise not carried in stock, which are filled by shipment direct to the customer either from the mail order establishment in Ft. Worth or from the factory making such merchandise located outside the State of Louisiana. The amount of such shipments during the fiscal year ending January 31, 1935 was estimated at

about 4% of the total sales of the Louisiana retail stores. The aforesaid factory or stock orders and transferred catalog orders constitute transactions in interstate commerce and constitute about 9% of the total business done by the Louisiana stores.

Sears, Roebuck & Co., (R. 154-164), a New York corporation, at the close of its fiscal year on January 29, 1935, operated 436 establishments of all sorts, subdivided as follows:

Mail Order	10
"A" Stores	69
"B 1-a" Stores	18
"B 1 Stores	53
"B 2 Stores	178
"B 3 Stores	46
"C" Stores	54
Submail Order Offices	2
Agencies	6
Total	436

The mail order stores carry almost every conceivable form of merchandise. "A" stores carry a full line of merchandise customarily found in large department stores. The "B" stores each carry certain particular lines of merchandise, each group carrying a particular line which is different from the line carried by the other group. "C" stores carry only sporting goods, hardware, kitchen utensils, electrical goods, automobile accessories, paints and oils, radios and tires and tubes. Sub-mail order offices carry no merchandise but merely take orders to be shipped by the mail order offices. Agencies carry hard line merchandise and work on a consignment basis.

As shown by the foregoing statement, the 436 estab-

lishments (which are all treated alike under the Louisiana statute) vary widely in character, and this is further illustrated by the following statement of the average sales and profits of the stores during the fiscal year ending January 29, 1935:

	Number of Units	Average Sales Per Store	Average Profit Per Store	Percent of Profit to Sales
Mail Order Stores	10	11,887,080	859,700	7.23
"A" Stores	69	1,614,334	77,290	4.79
"B" Stores	295	262,409	15,526	5.92
"C" Stores	54	76,123	6,148	8.08

In Louisiana the Company operated during the fiscal year ended January 29, 1935, 4 stores, of which 2 were "A" stores, 1 was a "B 1" store and one a "B 2" store, as follows:

Location	Type of Store	Sales in Year Ending 1-29-35
New Orleans, one "A" Store		$ 2,667,588
Shreveport, one "A" Store		931,369
Baton Rouge, one "B 1" Store		68,691
Alexandria, one "B 2" Store		167,419

In the four years from 1930 to 1935 inclusive, the Alexandria store showed losses in 1932 and 1933 and profits in 1934 and 1935. The Baton Rouge store, which was in operation only in 1935, showed a loss, and the New Orleans and Shreveport stores showed large losses in every year. The results of operations in Louisiana are relatively much worse than the results of operations in other states. The operation of the company as a whole showed a profit during the fiscal year ending January 29, 1935 in every state in which the company operated except Louisiana, Mississippi, North Dakota and Oklahoma. The maximum percentage and profit to sales was in the District of Columbia, where it was

12.86%. In Louisiana the Company lost .091% of sales. The average percentage of profit to sales all over the country was 3.69%. There was a wide difference in the operations from state to state depending on the class of units operated in each state and the conditions in each state. Conditions as to sales and profits vary greatly in all classes of stores according to the section of the country in which they are located. Conditions are less favorable to profitable merchandising operations in Louisiana, which is predominantly rural in character and a large portion of the population of which is negro.

F. W. Woolworth Company, (R. 170-177), a New York corporation, sells general merchandise at retail prices ranging up to 20c per article. On January 1, 1935, it operated a total of 2,634 stores, of which 1,811 were located in 48 states in the United States, 37 were situated in Canada, 8 in Cuba, 81 in Germany and 597 in Great Britain. 14 of these stores were situated in Louisiana. A tabulation for the years 1930 to 1935 showed the following comparison of earnings of sales in Louisiana and earnings of the entire system (excluding only income from British and German subsidiaries):

	1930	1931	1932	1933	1934
Entire System	8.73%	7.74%	6.56%	8.14%	6.5%
Louisiana	4.57%	3.13%	0.83%*	2.78%	3.77%

*This was a loss.

In the year 1934 the Louisiana net income per store was about half the average net income per store of the stores in the St. Louis District, which comprises 189 stores in 11 different states, including Louisiana. This is due to the more unfavorable conditions of operation in Louisiana. Conditions of operation in Louisiana are not at all affected by operations outside the state, and obviously

not by operations in foreign countries. Under the Louisiana statute, the F. W. Woolworth Company pays $550 per store on each of its 14 stores in Louisiana, while Morgan & Lindsey operating 28 stores in Louisiana, pays $20 per store.

H. L. Green Company, Inc., (R. 112-119), is a New York corporation which retails articles of merchandise at prices not exceeding $1.00. It operates a total of 127 stores in 33 states and the District of Columbia. It has only one store in Louisiana. The average profit per store for the entire system for the year ending January 31, 1935 was $12,291, while the profit of the Louisiana store was $8,615. The gross profit of the Louisiana store was approximately 3½% less than average. The poor showing in the Louisiana store was due in part to the heavy freight charges for shipment to Louisiana because of the distance from the markets. The actual freight cost is 3.93% of sales while the average freight cost for the entire system is only 1.99% of sales, or about one-half the Louisiana cost. Another reason for the poor showing in Louisiana is that the cafeteria of the Louisiana store operates on about a 35% profit as compared with approximately a 50% profit for the entire chain. This difference is presumably due to local competition and merely indicates the wide difference in conditions from state to state.

H. L. Green Company is in competition in Louisiana with Morgan & Lindsey, a Texas corporation, which is in exactly the same kind of business and operates a total of 45 stores in Louisiana, Mississippi, Alabama and Texas, of which 28 are in Louisiana. The financial statement of Morgan & Lindsey shows total assets exceeding three-quarters of a million dollars. Under the Louisiana statute Morgan & Lindsey pays $20 per store, while H. L. Green

Company, Inc. for its one store would pay $100. Morgan & Lindsey has the benefit of operating in a more limited area under closer supervision and in closer contact with local taste and conditions.

W. T. Grant Company, (R. 102-112), is a Massachusetts corporation, which operates a total of 465 limited price department stores, of which 5 are in Louisiana and 460 are situated in 37 other states. In percentage of earnings to sales, Louisiana stores did better than the average of the total stores in the years ending January 31, 1931 and January 31, 1932, and worse in the years ending January 31, 1933, January 31, 1934 and January 31, 1935. In percentage of earnings to investments, Louisiana stores did better than the average of the total stores in the years ending January 31, 1931, January 31, 1932 and January 31, 1934 and worse in the years ending January 31, 1933 and January 31, 1935. In earnings per store Louisiana stores showed a worse result than the average of all stores in the years ending January 31, 1933 and January 31, 1935 and a better showing in the other years. Detailed comparisons over 5 years past are shown in the record. For the fiscal year ending January 31, 1935 the percentage of earnings to sales for the entire system was 2.970, while in Louisiana the percentage was 1.590. In that year the total earnings of the system comprising 465 stores were $2,526,686, or an average of $5,434 per store while in Louisiana the earnings of five stores were $19,809, or an average of $3,962 per store.

G. R. Kinney, Inc., (R. 119-125), a New York corporation, sells shoes at retail. On January 1, 1935 it operated 330 stores in 37 states, of which 3 stores are situated in Louisiana. The earnings of the Louisiana stores as units for the years 1930 to 1934 inclusive have been greatly less than the average earnings of all stores, and returns

on values invested in Louisiana have been greatly less than the return on the Company's entire investment. The record contains a unit comparison by stores over a 10-year period.

J. J. Newberry Co., (R. 143-145), a Delaware corporation engaged in the operation of 5-10-25c stores of the variety type, in 1934 had 330 stores, none of which were located in Louisiana and the corporation was not engaged in doing business in Louisiana. The corporation has three subsidiary corporations, incorporated in Virginia, California and Texas respectively. Neither the Virginia company nor the California company has any stores in Louisiana. The Texas corporation, which operates a total of 15 stores, had in 1934 2 stores in Louisiana (now only 1). The Texas corporation began doing business in Louisiana only in 1933 and the first complete year of operation was 1934. In that year the two Louisiana stores made $2,788.62, or about $1,394 each, while the 431 total stores operated by all the Newberry corporations made $2,845,-199.71, or an average of $6,601 per store. The percentage of net earnings to sales for the corporation and the subsidiaries is something under 7%, while in Louisiana the percentage was less than 1½%.

J. C. Penney Company, (R. 145-149), a Delaware corporation, engaged in the business of selling general merchandise at retail, operated on January 1, 1935, 1474 stores in 48 states, of which 8 were located in Louisiana. A comparison of net earnings for the entire system with earnings of Louisiana for 5 years, indicates the percentage of earnings to sales in Louisiana to be less than the percentage of earnings to sales for the entire company in each year. Louisiana units are not comparable with units operated in other sections of the country and other states. The variations from section to section are illustrated by

a statement in the record comparing the results of the Company in 9 districts over 5 years. This statement shows that the percentage of net earnings to gross revenues varies from 8.426% down to 6.7416%. Possible variations in results between two different states is indicated by the fact that in North Dakota the percentage of profit to gross revenues was 9.08%, while in New Jersey it was 3.72%. Stores in any given state may show better or worse results than average and differ widely from stores in other particular states, which is due to disparity in wealth, population, purchasing power and the like.

The Scott-Burr Stores Corporation, (R. 150-153), a Delaware corporation, operates 5c to $1 retail variety stores. As of January 1, 1935, it owned and operated 135 stores in 26 states, 3 stores being situated in Louisiana. In the year 1934 all stores operated by the corporation made a profit of $59,752, while each Louisiana store operated at a loss, the New Orleans store losing $915, the Baton Rouge store losing $7,053 and the Alexandria store losing $2,858. In 1933 the present corporation was not in existence, but Scott Stores, Inc., a predecessor company, suffered a loss in that year on the 3 Louisiana stores of $12,000, as compared with a total loss of $15,000 on all its operations. Operations in Louisiana are more difficult and less profitable than average operations outside Louisiana.

Wohl Shoe Company, (R. 164-170), a Missouri corporation, operates leased shoe departments in department stores owned and operated by others. These departments are operated in the names and under the supervision of the owners, as in the case of Consolidated Millinery Company. The Company operates a total of 209 such departments and 23 stores, which are located in 37 states and the District of Columbia. 6 of the departments are located in the State of Louisiana. In the years 1932 and 1933,

the Company's operations in Louisiana were conducted at a loss. In 1934 they showed a profit of 1.72%. The entire system showed a profit in each of the three years ranging from 4.96% in 1932 to 4.81% in 1933 and 4.90% in 1934. The record contains an itemized statement of the operations of the entire company in 1933 and 1934 in each of the states in which it operated in those years. This statement illustrates the extremely wide variations in results from state to state.

Consolidated Millinery Company, (R. 98-101), an Illinois corporation, also operates what is known as leased departments in stores belonging to others in 43 states and the District of Columbia. Of these 5 are situated in Louisiana. Operating results in Louisiana are inferior to the average operating results all over the country and in immediately adjoining states. The Company's income tax returns show an average earning for Louisiana stores amounting to $1,161.78 and an average per store for the entire system amounting to $1,232.42, but from store to store and section to section earnings vary widely. In the millinery business local taste, conditions and contacts are specially important.

Federal Trade Commission Reports Negative Any Finding That Increase In Size Gives Advantage to Larger Chains

The annual report of the Federal Trade Commission for the fiscal year ending June 30, 1935 contains at page 32 and following a summary of the Commission's chain store investigation. At page 39 of the report the following statement is made as to the absence of any evidence to support a finding that increase in size gives any advantage to larger chains.

"**Prices and operating results of large and small chains.**—Based on an analysis of the gross profits on retail sales and average net retail sales per store for the years 1921-30, both separately and combined, **there is little evidence of any close general relationship between the size of the chain and either the average sales per store or the size of the spread** between the cost of merchandise to the chain and the selling price to the consumer, commonly known as the 'gross margin.'

"**A somewhat similar result to the foregoing is shown by the gross margin and operating expense percentages** on sales for various kinds of chains consolidated for 8 years according to the number of stores operated. These figures are subject to the qualification of including the entire operating results of the chains, thus taking into account wholesaling and manufacturing operations in addition to retail selling.

"In the case of operating expenses, chains in 11 kinds of business show only indeterminate results, according to the number of stores operated, those in the remaining lines being about evenly divided between chains showing a tendency for operating expenses to increase and those showing a tendency for operating expenses to decrease with the size of the chain.

This summary is supported by the itemized figures which appear in the detailed reports made by the Federal Trade Commission to Congress. See Report on Sales, Costs and Profits of Retail Chains, Senate Document No. 40, 73rd Congress, First Session, table 32 at page 55, which appears in an appendix. As appears from this table, chains between 100 and 500 units show a greater net operating profit (5.65%) than chains which operated over 1,000 units (4.23%) Chains operating 2 to 5 stores had a greater percentage (4.86%) of net operating profit

to sales than did chains operating over 500 units (4.39%) and a considerably greater percentage than did stores operating over 1,000 units (4.23%).

See also the Report on Gross Profit and Average Sales Per Store of Retail Chains, Senate Document No. 178, 72nd Congress, 2d Session, table 16, which likewise appears in the appendix. In its comment on this table, at page 33, the Federal Trade Commission says:

> "This table would seem to indicate that there is a very decided and definite tendency for both average sales per store and gross profits of chain stores as a whole to **decline as the size of the chain increases.** Except in the 101 to 500 group, there is a regular and marked decline in average sales per store as the size of the chain increases. Except for the 6 to 10 store chains, there is also a similar marked and regular decline in the percentage of gross profit to sales. This apparent tendency also appears in the figures of 1921-1930 as is shown by the following table covering those years. The detailed totals upon which this table is based will be found in Appendix Table 5."

Evidence for Defendants

The defendants' testimony consisted chiefly of the affidavits of various merchants residing in Louisiana, some of whom were operators of local chains and others of whom were wholesalers, reciting the **opinion** of the affiants as to the advantages enjoyed by chains. These affidavits (R. 190-255) are largely repetitious. They contain no competent factual testimony. They reiterate merely the unsupported opinion of the affiant to the general effect that "the greater the amount of purchases of a chain, the greater the buying power and the greater the advantage afforded the operator * * * * *; the greater

the number of units in the chain or system, the greater the buying power and the greater the opportunity for distribution at lower cost, the lower the cost of distribution, the lower the cost of advertising, and the greater the many other advantages accruing to such operators,"' also general expressions of opinion that chains undersell local independents and are gradually eliminating independents as well as wholesale merchants (R. 190-209). Expressions of opinion were carried to the point of having two members of the Louisiana Legislature who voted for the challenged statute, recite their motives for procuring the passage of the law. Thus, one legislator (R. 251) recited in his affidavit that he became "co-sponsor" of the challenged statute because he had become convinced that the ordinary chain store tax statute such as the Louisiana Act of 1932 "was not accomplishing the results desired" in that it failed to reach "in a just proportion" the chain stores operating in Louisiana that had the greatest purchasing power.

> "by virtue of the great number of stores *operated outside the State of Louisiana* and because of the enormous volume of business done *beyond the confines of this State.*" (Italics ours).

The affidavit of another legislator recites (R. 254) that the national chains "with their enormous purchasing power and other advantages accruing by virtue of their operating in multiple units" are forcing independents out of business and that the Legislature and himself individually

> "believed and were of the opinion that the State of Louisiana, in its sovereign capacity, should encourage individual initiative among its citizenship, and individually owned, in preference to chain

ownership, for the reason that a person makes a better citizen when he owns his own business establishment and is not a mere employee at a meagre wage of some gigantic corporation whose officials he does not know and whose officials do not recognize his needs and wants and the employees accept work with the organization solely and only because, by reason of the size of the organization, he is unable to operate as an independent retailer and own his own establishment."

Mr. William E. Penick, Vice-President and executive head of H. G. Hill Stores, Inc., made an affidavit reciting in general terms that The Great Atlantic & Pacific Tea Company enjoys great advantages over the Hill Stores in purchasing power, spreading its operation over a wide area, and use of national radio advertising (R. 219-225). In this affidavit reference was made to the testimony given by representatives of The Great Atlantic & Pacific Tea Company before the Special Committee appointed by the House of Representatives to investigate the American Retail Federation, according to which Atlantic & Pacific received in 1934 special discounts, allowances and brokerages amounting in round figures to $8,105,000.

Upon the filing of Mr. Penick's affidavit, a rebuttal affidavit was filed by Mr. David P. Bofinger, Vice-President of The Great Atlantic & Pacific Tea Company (R. 96), reciting that H. G. Hill Stores had invested capital of approximately $1,000,000, operated 87 stores in New Orleans and had reported in 1933 sales of not less than $4,000,000, and that their operations were so extensive that they were in a position to receive allowances and discounts as great as those received by the A. & P. on the great bulk of their purchases, if not on all of them, the detailed facts of these allowances being specially within the knowledge of operators of Hill Stores. In reply to

this affidavit there was filed a further affidavit by Mr. Penick (R. 225), reciting that this statement of Mr. Bofinger was erroneous and untrue, and that the allowances received by the A. & P. were many times greater than those received by Hill Stores. **Mr. Penick, however, did not state the amount of allowances actually received by Hill Stores** and was apparently unwilling to give information corresponding to that supplied by A. & P. officials.

Mr. Penick's affidavit and the testimony therein quoted related only to discounts and allowances to The Great Atlantic & Pacific Tea Company. The court below made a specific finding in the case of Liggett Drug Company (see paragraph XIV of the findings, R-267) to the effect that in the drug trade quantity discounts do not become any greater after a certain point is reached.

The general statements made in the defendants' affidavits as to growth of chains at the expense of independents are refuted by official figures of the Bureau of the Census, which are referred to at R. 182-3. In the United States as a whole between 1929 and 1933 the total number of retail stores declined 1.1%, while the number of retailers (proprietors actively engaged in their stores but not on payrolls) increased 4.2%.[1] The following table shows that the number of chain stores in Louisiana decreased between 1929 and 1933 more than the number of independents.[2]

	1929	*1933*	*Percentage of Change*
Independents	20,994	20,014	—4.67%
Chains	1,224	1,144	—6.54%

[1]Census of American Business Retail Distribution: 1933, by Areas, page 3.

[2]Census of Retail Distribution for Louisiana, R-129 (1929) page 20; Census of American Business, Chains and Independents (1933) page 37.

The total number of wholesalers of all kinds in Louisiana, including agents, brokers, manufacturers and sales branches, etc., increased from 1,729 in 1929 to 2,097 in 1933, an increase of 21.2%.[3] The number of "wholesalers proper" in Louisiana, under which are included wholesale groceries, wholesale drugs, wholesale hardware and other lines, increased during the same period from 882 to 1,109, an increase of 24.6%.[4]

The court below recognized the conclusive force of the census figures by including in its findings of fact in paragraph V the following (R. 265):

> "The number of chain stores in Louisiana is decreasing at a more rapid rate than the number of independent stores, and the number of wholesale stores in Louisiana is actually increasing."[5]

The court below however also adopted in paragraph VI of its findings the general statements made in the affidavits of the witnesses for the defendants to the effect that,

> "The greater the number of units in the chain, the greater the purchasing power, the greater the secret rebates and allowances, the greater the ad-

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[3]Census of American Business Wholesale Distribution: 1933, Vol. VI, page 30.

[4]Ibid, page 139

[5]The 1935 Census figures, which have become available since the record below was prepared and of which the court may take judicial notice, show the number of chain stores in Louisiana to be 1,052 and the number of independents 21,569. This shows that the number of chain stores further decreased between 1933 and 1935, but the number of independents actually increased. See Census of Business, 1935, Retail Distribution, Vol. 4, page 81.

vantages in advertising, the greater the capital employed, the greater the social and economic consequences, and the lower the cost of distribution and overhead." (R. 265).

And in paragraph VIII the court made a finding that

"In fine, the record in this case shows the contribution to the advantages made by each unit in the chain and the per unit advantage made possible by the whole system, and in that respect only does it differ materially from the proof which was before the court in the Jackson case." (R. 266).

These findings, which were duly objected and excepted to (R. 271), have no support in this record other than the unconfirmed expressions of opinion contained in the affidavits of the witnesses for the defendants. It is true that the Congressional Committee which investigated the American Retail Federation found that large discounts and advertising allowances had been made to The Great Atlantic & Pacific Tea Company. There was, however, no showing that these allowances resulted from the number of units in the chain, or that The Great Atlantic & Pacific Tea Company would not have received the same allowances if it had had a very much smaller number of units in its chain. The finding that the greater the number of units in the chain, the greater the advantages to the chain is directly negatived by the report of the Federal Trade Commission in Senate Document No. 40, 73rd Congress, 1st Session, and Senate Document No. 178, 72d Congress, 2d Session, to which reference is made *supra*, pages 27, 28. The court below itself made a specific finding that in the drug trade quantity discounts do not become any greater after a certain point is reached (R. 267).

General Findings of Fact Bearing Upon the Operations of Complainant and Intervenors

The court below conceded the conclusive character of the testimony as to the wide variation between operations of chains in Louisiana and operations outside the State, and the relatively unprofitable character of operations in Louisiana, by including in its findings of fact as paragraph IX the following (R. 266):

> "Operations of chains doing business in more than one state vary greatly from section to section and from state to state because of differences in local conditions, economic and otherwise, freight rates added to cost, remoteness from headquarters and executive management, increase in difficulty of supervision, local competition and other factors. Conditions as to sales and profits vary greatly in all classes of stores according to the section of the country in which they are located. In almost every case operations in Louisiana are less than average for all stores operated by the particular company."

Detailed Findings of Fact Comparing Operations of Complainant and Intervenors with Local Chains

The court below also conceded the conclusive character of the evidence that certain local chains did far more business in Louisiana than complainant and comparable intervenors, yet were taxed at far smaller rates under the challenged statute. See e. g. paragraphs IV, X and XIV of the findings (R. 264, 266, 267):

> "The operations of the complainant, The Great Atlantic & Pacific Tea Company, in the City of New Orleans are the same in general character as those of H. G. Hill Stores, Inc., a Louisiana corporation, which operates 87 stores in New Orleans. Both the complainant and H. G. Hill Stores, Inc. operate a

chain of grocery and meat stores carrying about the same lines of merchandise, and their merchandising methods, leader items and selling prices are practically the same. The gross volume of sales of the Hill Stores in New Orleans is very much greater, they have more stores and do more business per store than does the complainant. The total purchasing power of the complainant, The Great Atlantic & Pacific Tea Company is much greater than that of H. G. Hill Stores, Inc. The complainant has field offices located at primary markets, which are in charge of specialists and supervised by central purchasing offices in New York, and maintains divisional warehouses throughout the country. The operations of the Hill Stores are confined to Louisiana and chiefly to New Orleans. Under the Louisiana statute, the Hill Stores pay a tax of $30 per store."

"H. L. Green Company, Inc., a New York corporation, retails articles of merchandise at prices not exceeding $1. It operates a total of 127 stores in 33 states and the District of Columbia. It has one store in Louisiana. It is in competition in Louisiana with Morgan & Lindsey, a Texas corporation, which operates a total of 45 stores in Louisiana, Mississippi and Alabama, of which 28 are in Louisiana. Under the Louisiana statute H. L. Green Company, Inc. pay a tax of $100 on one store while Morgan & Lindsey pay $20 per store."

"Liggett Drug Company, a Delaware corporation, operates 452 stores situated in 32 states and the District of Columbia, of which 6 stores are located in Louisiana. In New Orleans the Liggett Stores are in competition with 3 local chains and in Shreveport with 1 local chain. One of the local chains, Katz & Besthoff, Ltd. operates 10 stores in the State of Louisiana, all of which are in New Orleans. Katz & Besthoff's general methods of doing business are the same as those of Liggett, but

the gross volume of the sales of Katz & Besthoff stores is very much greater, they have more business and do more business per store than the stores of Liggett. In the drug trade quantity discounts do not become any greater after a certain point is reached. Under the Louisiana statute the Liggett tax is $500 per store while the Katz & Besthoff tax is $10 per store."

SUMMARY OF ARGUMENT

(1) The Louisiana statute taxes operations outside the State.

(2) The Fourteenth Amendment precludes the State from imposing such a tax. A state cannot by language or indirection accomplish an unconstitutional purpose. The right of Louisiana to exclude a foreign corporation cannot be used as a basis for taxing it upon property or operations that by established principles the State has no power to tax.

(3) The Louisiana statute cannot be supported on the theory that Louisiana taxes only what is in Louisiana by analogy to allocation cases. Allocation cases do not involve any question of **rate** of taxation. They deal only with the problem of determining what is within the State. They afford no support to an attempt to increase the **rate** on what is within the State by reference to what is outside.

The allocation cases deny any right to a State to tax outside operations. An allocation formula is valid only where it fairly determines what is within the State. Such a formula cannot be based solely upon units where such units differ greatly in character and size from state to state and foreign country. The Louisiana statute gives the same effect to the existence of all establishments

under the same ownership wherever situated without regard to character, location or bearing upon Louisiana business. The Louisiana statute does not undertake any classification of chains into national, sectional and local. It gives no weight whatsoever to geographical location.

Under an allocation formula a State's power to tax would never increase while operations within the State decreased, **but this is the effect of the Louisiana statute.** The Louisiana statute is designed, not to determine by proper allocation what is within Louisiana, but to bring into Louisiana what is not there, or to change the rate of tax on what is within Louisiana because of what is elsewhere.

(4) Because of its extra-territorial operation, the Louisiana statute denies the equal protection of the laws to chains doing business in Louisiana by arbitrarily discriminating between them. The statute was not designed to protect, and does not protect, independents against chains, but discriminates in favor of certain chains against others.

(5) If the Louisiana chain store statute is valid, its principle is equally applicable to income, franchise and sales taxes. If the rate of such taxes applicable to operations within the State can be increased by reference to factors outside the State, the State may by such increase exclude operations or individuals operating outside the State. This would convert the Union into a Confederation of States. Prohibition of size extending to operations outside the state may properly be accomplished only by national legislation.

ARGUMENT

(1) The Louisiana Statute Taxes Operations Outside the State.

Under the Louisiana statute a corporation, firm or individual operating 1 establishment in Louisiana and no establishment elsewhere, pays no tax in Louisiana. If the corporation, firm or individual then acquires an establishment in New York, the acquisition of that establishment subjects the owner to a tax in Louisiana upon the Louisiana establishment.

If a company operates 10 establishments in Louisiana and none elsewhere, it is required to pay Louisiana a tax of $10 per establishment, or $100. If it acquires an additional establishment anywhere in the world outside of Louisiana, the rate of taxation upon the 10 establishments in Louisiana then becomes $15 per establishment, or $150, or an increase of 50% in tax upon the Louisiana establishments solely as a result of the acquisition of one establishment outside Louisiana. If a company operating 125 establishments throughout the world, of which 1 is situated in Louisiana, then acquires 1 additional establishment anywhere in the world, the Louisiana tax on the 1 establishment in Louisiana is increased 100%, being increased from $50 to $100 by virtue solely of the fact that the company has acquired an additional establishment outside of Louisiana.

Thus, a company or individual operating in Louisiana would be penalized by Louisiana by the imposition of additional Louisiana taxes if that company or individual undertakes to open even 1 additional establishment outside Louisiana. The necessary effect is that Louisiana regulates operations outside Louisiana and may deter or in effect prevent such operations. If the principle of the Louisiana

tax is sound, there is no limit as to the amount of tax which Louisiana might claim as a result of what is done outside Louisiana.

The intervenor, Wohl Shoe Company, for example, operates 232 shoe departments, of which 6 are in Louisiana. Its 6 Louisiana departments fall into bracket 11 of the Louisiana statute and are subject to a tax of $300 each. If Wohl Shoe Company operated only 225 departments outsideLouisiana and still 6 in Louisiana, it would fall into bracket 10 and pay a Louisiana tax of $250 per department, or $50 less per department. Louisiana has thus increased the tax upon Wohl Shoe Company because of its operation of additional departments outside Louisiana.

Under the Louisiana statute the tax claimed by Louisiana may be increased although operations in Louisiana actually decrease. If a company operates 100 stores, of which 2 are located in Louisiana, it will be required to pay to Louisiana under the challenged statute $30 per store, or $60. If the company finds its operations in Louisiana unprofitable and discontinues 1 of its Louisiana stores but expands its operations in other sections of the country, no matter how remote, so that it operates a total of 126 stores anywhere in the world, it will then be required to pay Louisiana $100 upon the 1 store that is left in Louisiana, although it was previously paying only $60 for the operation of 2 stores in Louisiana. **Thus, it is burdened with additional taxes in Louisiana, although it has decreased its operations in Louisiana.**

The table printed at page 9, *supra*, shows that Companies B which operates 5 stores in Louisiana is required to pay to Louisiana under the challenged statute taxes aggregating $1,250, while Company C, having precisely the same number of stores in Louisiana, is re-

quired to pay $2,500, or twice as much. Company E, having 3 stores in Louisiana, pays $1,350, while Company J, also having 3 stores in Louisiana, pays only $300, or only one-fourth as much as Company E. Company F, having 6 stores in Louisiana, is required to pay $3,000, while Company L, having an equal number of stores in Louisiana, is required to pay only $1,800. These examples show differences in taxes payable in Louisiana, ranging from 100% to 400%, resulting solely from operations outside Louisiana.

The member of the Louisiana Legislature who testified as a witness for the defendants in effect admitted that the 1934 Louisiana statute was **in fact designed** to tax what is **outside** Louisiana. We refer to the affidavit of Representative Burns (R. 251), who stated that the prior Louisiana statute (which calculated the tax only upon stores within the State) failed to reach in a just proportion

> "the chain stores operating in Louisiana that had the greatest purchasing power **by virtue of** the great number of stores operated **outside** of the State of Louisiana, and because of the enormous volume of business done **beyond the confines of this State.** That **as a result** of this thought and study * * * * Act 51 of 1934 was prepared with the view in mind that chain stores should be taxed on the basis of the number of units in the national chain, and not solely on the number of units operating in the State of Louisiana, * * * * *"

If the Louisiana law is upheld and every state passes a similar law, then before any one operating a mercantile establishment in one state could open an additional establishment anywhere in the world, he or it would have to consider the effect of opening that establishment upon

taxes in every other state. The result of opening an additional establishment in one state would be to increase the taxes which the owner would have to pay upon existing establishments in every other state. Thus, **the tax cost of opening an additional establishment in any one state would depend not upon the law of that state but upon the law of 47 other states.** If the effect of opening an additional establishment in State A (without any increase in the operations in other states), is to increase the taxes in all other states or even in a number of such other states the result will be to deter the opening of the additional establishment in State A. This further illustrates how a statute like the Louisiana statute reaches out beyond the state and operates to control what is done in other states.

(2) The Fourteenth Amendment Precludes the State from Imposing a Tax on Operations Outside the State.

This Court has repeatedly declared that a state statute taxing operations outside the state is invalid as the taking of property without due process of law and in violation of the 14th Amendment of the Constitution of the United States.

In *Safety Deposit Trust Company vs. Virginia*, 280 U. S. 83 (1929), the Court said (page 92)*:

> **"A statute of a State which undertakes to tax things wholly beyond her jurisdiction or control conflicts with the Fourteenth Amendment.** *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 204; *Buck v. Beach*, 206 U. S. 392, 402, 408, 409; *Frick vs. Pennsylvania*, 268 U. S. 473; *Wachovia Bank & Trust Co. v. Doughton*, 272 U. S. 567, 575."

*Black lettering or bold face type throughout this brief is ours unless otherwise specifically indicated.

In *Provident Savings Association vs. Kentucky*, 239 U. S. 103 (1915), the Court said at page 112:

> **"Taxation without jurisdiction has been held to be a violation of the Fourteenth Amendment** (*Louisville & Jefferson Ferry Co. v. Kentucky*, 188 U. S. 385, 398; *Del., Lack. & West. R. R. v. Pennsylvania*, 198 U. S. 341, 358; *Union Transit Co. v. Kentucky*, 199 U. S. 194, 209); **and the principle involved applies to the assertion of authority on the part of the State to exact a license tax for the privilege of doing acts which lie beyond the sphere of local control."**

In *Louisville etc. Ferry Company vs. Kentucky*, 188 U. S. 385 (1903) the tax involved was a franchise tax assessed against a Kentucky corporation. It was contended that Kentucky had a right to include in its assessment the value of a franchise from the State of Indiana conferring the privilege of maintaining a ferry across the Ohio River from the Indiana shore to the Kentucky shore. The Court in denying the right of Kentucky to maintain the tax, said at pages 395, 396:

> "As, then, the privilege of maintaining the ferry in question from the Indiana shore to the Kentucky shore is a franchise derived from Indiana, and as that franchise is a valuable right of property, is it within the power of Kentucky to tax it **directly or indirectly?** It is said that the Indiana franchise has not been taxed, but only the franchise derived from Kentucky; that the tax is none the less a tax on the Kentucky franchise, because of the value of that franchise being increased by the acquisition by the Kentucky corporation of the franchise granted by Indiana. **This view sacrifices substance to form.** If the Board of Valuation and Assessment, for purposes of taxation, had separately valued and assessed at a given sum the franchise derived by the ferry company from Ken-

tucky, and had separately valued and assessed at another given sum the franchise obtained from Indiana, the result would have been the same as if it had assessed, as it did assess, the Kentucky franchise as an unit upon the basis of its value as enlarged or increased by the acquisition of the Indiana franchise.

"The learned counsel for Kentucky says that it is the value of the company's franchise contained 'in its charter' which is the subject of taxation. But the franchise obtained from Indiana is not in the company's charter granted by Kentucky. It is contained only in the act of the Legislature of Indiana. The Indiana franchise was not carried into the charter of the Kentucky corporation by reason of that corporation having the authority to purchase it. Its existence and validity depend entirely upon the laws of Indiana.

"Counsel further say that Kentucky does not impose a tax upon the company's privilege, *as such*, granted by the State of Indiana. If it had done so the tax so imposed would not have been defended as valid. Yet by her statute, under which the Board of Valuation and Assessment proceeded, **Kentucky has accomplished that result by including for purposes of taxation, in the valuation of the franchise granted by it, the value of the franchise granted by Indiana, and then taxing the franchise of the Kentucky corporation upon the basis of the aggregate value of both franchises.** Although now owned by one corporation, these are separate franchises."

In the case cited it was argued that the franchise to operate a ferry to the Kentucky shore was more valuable in Kentucky because of the existence of a similar franchise in Indiana, without which the ferry could not have been operated between the two shores. This argument corresponds to the argument in the present case that Louisiana has the right to tax complainant and in-

tervenors upon what they do and have elsewhere because what they have and the operations they conduct elsewhere make their Louisiana operations more valuable. Adopting the language used by the court in the case cited, such an argument sacrifices substance to form. If Louisiana had undertaken to directly impose a tax upon the privilege of doing business elsewhere, the tax could not be defended as valid, yet Louisiana seeks to accomplish that result by basing its tax upon the privilege granted by other states.

In *Delaware, L. etc. Railroad Company vs. Pennsylvania*, 198 U. S. 341 (1905), under the authority of a Pennsylvania statute, there had been levied upon a Pennsylvania corporation a tax upon its capital stock. The corporation contended that in fixing this tax it had a right to deduct the value of coal belonging to the corporation situated outside the State. The court upheld this contention, saying (page 356):

> "We regard this tax as in substance and fact, though not in form, a tax specifically levied upon the property of the corporation, and part of that property is outside and beyond the jurisdiction of the State which thus assumes to tax it. * * *
>
> "So, if the State cannot tax tangible property permanently outside the State and having no *situs* within the State, it cannot attain the same end by taxing the enhanced value of the capital stock of the corporation which arises from the value of the property beyond the jurisdiction of the State.
>
> "We think the state court is right in deducting, as it does, the value of the tangible property, when permanently held in another State, and we think that for the same reason the same rule should obtain in the case of tangible property situated, as this coal was. We cannot see the distinction, so far as the question now before the court is concerned, between a tax assessed upon property, *eo*

nomine, or specifically, when outside the State, and a tax assessed against the corporation upon the value of its capital stock to the extent of the value of such property, and which stock represents to that extent that very property. If the property itself could not be specifically taxed because outside the jurisdiction of the State, how does the tax become legal by providing for assessing the tax on the value of the capital stock to the extent it represents that property and from which the stock obtains its increased value? Can the mere name of the tax alter its nature in such case? **If so, the way is found for taxing property wholly beyond the jurisdiction of the taxing power** by calling it a tax on the value of capital stock or something else, which represents that property. Such a tax, in its nature, by whatever name it may be called, is a tax upon the specific property which gives the added value to the capital stock."

At the conclusion of its opinion, the court referred to *Louisville, etc. Ferry Company vs. Kentucky, supra*, and said (page 360):

"It is plain that in the case at bar the coal had lost its *situs* in Pennsylvania by being transported from that State to foreign States for the purposes of sale, with no intention that it should ever return to its State of origin. It was, therefore, as much outside the jurisdiction of the State of Pennsylvania to tax it as was the Indiana franchise in the case just cited, and it has been taxed just as directly and specifically under the facts stated in this case as was the Indiana franchise taxed in Kentucky by the valuation of the Kentucky franchise, **which value was increased by the value of the franchise created by Indiana.** Taxation of the coal in this case deprived the owner of its property without due process of law, as is held in the above case, and the owner is entitled to the protection of the Fourteenth Amend-

ment, which prevents the taking of its property in that way."

The cases immediately above cited were followed by *Union Transit Company vs. Kentucky*, 199 U. S. 194 (1905), commonly cited as the leading authority against the power of a state to tax property beyond its borders. It was there held that a corporation organized under the laws of Kentucky was not subject to taxation upon tangible personal property (freight cars) situated outside the State of Kentucky, and that such taxation would be a violation of the 14th Amendment. The court laid down the rule in general terms (page 204):

> "It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation."

In *New York Life Insurance Company vs. Head*, 234 U. S. 149 (1914), it was held that a Missouri statute regulating loans on policies of life insurance could not operate to affect a contract made in another state by the insured and the company, the head-note reading:

> "A State may not extend the operation of its statutes beyond its borders into the jurisdiction of other States, so as to destroy and impair the right of persons not its citizens to make a contract not operative within its jurisdiction and lawful in the State where made."

At page 162, the court said, citing the earlier cases above noted:

> "It is illustrated as regards the right to freedom of contract by the ruling in *Allgeyer v. Louisiana*, 165 U. S. 578, and it finds expression in the decisions of this court affirmatively establishing that **a State may not consistently with the due process clause of the Fourteenth Amendment extend its authority beyond its legitimate jurisdiction** either by way of the wrongful exertion of judicial power or **the unwarranted exercise of the taxing power.**"

And at page 163, after referring to the contention of counsel, the court said:

> "But when this reasoning is analyzed we think it affords no ground whatever for taking this case out of the general rule and making the distinction relied upon. This is so as the proposition cannot be maintained without holding that because a State has power to license a foreign insurance company to do business within its borders and the authority to regulate such business, therefore a State has power to regulate the business of such company outside its borders and which would otherwise be beyond the State's authority. A distinction which brings the contention right back to the primordial conception upon which alone it would be possible to sanction the doctrine contended for, that is, that **because a State has power to regulate its domestic concerns, therefore it has the right to control the domestic concerns of other States.** It is apparent therefore that to accept the doctrine it would have to be said that the distribution of powers and the limitations which arise from the existence of the Constitution are ephemeral and depend simply upon the willingness of any of the States **to exact as a condition of a license granted to a foreign corporation to do business within its borders that the Constitution shall be inapplicable and its limitations worth nothing.** It would go further than this, since it would require it to be

> decided not only that the constitutional limitations on state powers could be set aside as the result of a license but that the granting of such license could be made the means of extending state power so as to cause it to embrace subjects wholly beyond its legitimate authority".

So in this case to maintain the power asserted by Louisiana would be to give Louisiana the right in effect to regulate business outside its borders and the right to control the domestic concerns of other states. **It would give Louisiana the power to exact as a condition of a license granted to plaintiff and intervenors to do business within its borders "that the Constitution shall be inapplicable and its limitations worth nothing".** If the Louisiana statute is upheld, then the operations of the parties in this case outside Louisiana are in effect controlled by Louisiana. If the theory of the Louisiana statute is sound, it may be extended. A corporation which has one store in Louisiana might be required to pay an additional $1,000 to Louisiana for opening a store in New York. This would in effect make the right to do business in other states dependent upon conditions imposed by the Louisiana law. It is no more answer to say that this is the result of the corporation doing business in Louisiana and thereby submitting itself to the Louisiana law than it was in the case cited to say that the act regulating loans on life insurance policies should be upheld because the foreign insurance company had undertaken to do business in Missouri. The statute there as here undertook to affect what might be done outside the state by a corporation doing business inside the state. The statute here must be held as bad under the 14th Amendment as the statute in the case cited.

A State Cannot by Language or Indirection Accomplish an Unconstitutional Purpose.

In *Fidelity and Deposit Company of Maryland vs. Tafoya*, 270 U. S. 426 (1926), a statute of New Mexico prohibited any insurance company from paying any non-resident of the state any fee or brokerage for writing any insurance policies covering risks in New Mexico. The statute was held invalid under the 14th Amendment, the court saying (pp. 434, 435):

> "Coming then to the merits, we assume in favor of the defendants that the State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. **But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result.** * * * *Frick v. Pennsylvania*, 268 U. S. 473. *American Bank & Trust Co. v. Federal Reserve Bank of Atlanta*, 256 U. S. 350, 358. *Badders v. United States*, 240 U. S. 391, 394. *United States v. Reading Co.*, 226 U. S. 324, 357. Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal court, *Terral v. Burke Construction Co.*, 257 U. S. 529; **or to tax it upon property that by established principles the State has no power to tax,** *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1 and other cases in the same volume and later that have followed it; or to interfere with interstate commerce, *Sioux Remedy Co., v. Cope*, 235 U. S. 107, 203; *Looney v. Crane Co.*, 245 U. S. 178, 188. *Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 114. A State cannot regulate the conduct of a foreign railroad corporation in another jurisdiction, even though the Company has tracks and does business in the State making the

attempt. *New York, Lake Erie & Western R. R. Co. v. Pennsylvania*, 153 U. S. 628, 646."

The Louisiana statute involved in the present case undertakes to do what this decision says cannot be done. Thus the Louisiana statute seeks to obtain additional revenues for Louisiana by taxing operations outside the State notwithstanding the fact that the privilege of conducting such operations is derived from the States within whose borders they are carried on, that such States themselves tax such operations, that Louisiana does not and cannot grant a license to do business beyond its borders, and that an extra-territorial tax is a clear violation of the 14th Amendment.

The principle that the form of the statute must yield to its substance and that **a State cannot by language or indirection accomplish an unconstitutional purpose,** is illustrated in *National Life Insurance Co. v. United States*, 277 U. S. 508, (1927). It there appeared that under the provisions of the Federal Revenue Act of 1921 the plaintiff insurance company was entitled to deduct from its gross income (1) interest on tax-exempt securities and (2) 4% of the Company's mean reserve funds diminished, however, by the amount of the first deduction comprising interest from tax-exempt securities. The plaintiff although allowed the first deduction comprising the interest from its exempt state, municipal and United States bonds was not advantaged thereby; for, since the same amount was subtracted in computing the second deduction, its tax was the same as if all of its securities had been taxable, and higher than it would have been if those that were tax-free had not belonged to it. This Court held that the effect of the statutory computation of deductions was to impose a direct tax on the income of the exempt securities, amounting to taxation of the securi-

ties themselves, and that the tax insofar as it affected state and municipal bonds was unconstitutional. The court said at page 519:

> "The portion of petitioner's income from the three specified sources which Congress had power to tax—its taxable income—was the sum of these items less the interest derived from tax exempt securities. Because of the receipt of interest from such securities, and to its full extent, pursuing the plan of the statute, the Collector diminished the 4% deduction allowable to those holding no such securities. Thus, he required petitioner to pay more upon its taxable income than could have been demanded had this been derived solely from taxable securities. **If permitted this would destroy the guaranteed exemption. One may not be subjected to greater burdens upon his taxable property solely because he owns some that is free.** No device or form of words can deprive him of the exemption for which he has lawfully contracted."

This decision was followed in *Missouri vs. Gehner*, 281 U. S. 313 (1930), where the statute after recognizing United States bonds as exempt from taxation, provided that debts should be applied against these exempt securities with the result that the owner was left subject to the same taxes as it would have had to pay if it had owned no exempt bonds. The court held that the State had no power to pass such a statute and struck down the attempt. This case was cited by the court with approval in *Schuylkill Trust Co. v. Pennsylvania*, 296 U. S. 13 (1935).

The cases last cited afford another application of the principle stated by Justice Holmes in the *Fidelity & Deposit* case, *supra*, that **"a State may not use a so-called right as part of a scheme to accomplish a forbidden result"**. Yet that is precisely what the Louisiana statute

undertakes to do. In the case at bar, it would be conceded that Louisiana had no power directly to tax property and operations beyond its borders; but the effect of increasing the taxes upon operations within the borders of Louisiana solely because the owner conducts operations outside of Louisiana is tantamount to taxing the operations outside the state just as surely as in the cases cited the method employed amounted to taxing exempt property and income through the device of increasing taxes upon non-exempt items. The plaintiff and intervenors may not be subjected to greater burdens upon their operations in Louisiana solely because they conduct operations outside Louisiana which it is beyond the constitutional power of Louisiana to tax. Paraphrasing the language of the *National Life Insurance Co.* case, plaintiff and intervenors **"may not be subjected to greater burdens upon their taxable business in Louisiana solely because they conduct business outside Louisiana which is tax-free in Louisiana".**

In *Bethlehem Motors Corporation vs. Flynt*, 256 U. S. 421 (1921), the court set aside as discriminatory and in violation of the 14th Amendment, a North Carolina statute which imposed a license tax of $500 upon every automobile manufacturer making sales within the state, with a provision that the tax should be reduced to $100 for every manufacturer who showed that at least three-fourths of his entire assets were invested either in bonds of the United States or its municipalities, or in property situated within the state and returned for taxation there.

In *Colgate vs. Harvey*, 296 U. S. 404 (1935), the Court held invalid under the 14th Amendment a Vermont statute which exempted from taxation the net income from money loaned within the state at not more than 5% interest, saying:

" • • • The right of a citizen of the United

States to engage in business, to transact any lawful business, or to make a lawful loan of money in any state other than that in which the citizen resides is a privilege equally attributable to his national citizenship. A state law prohibiting the exercise of any of these rights in another state would, therefore, be invalid under the Fourteenth Amendment. The imposition by one state of a discriminating tax upon a citizen resident in another state for trading in the territory of the former has been held invalid. *Ward v. Maryland*, 12 Wall. 418, 430. And, of course, conversely, a tax of that description is likewise void if imposed by one state upon a resident citizen of the United States for trading or doing business in the territory of another state. **And such a tax is not justified because the taxing state will thereby help its domestic business.** * * *

"And it well cannot be doubted that legislation of one state denying the privilege or taxing the transaction when it occurs in another state, while leaving the transaction wholly free from taxation when it takes place in the former state, would abridge that privilege of citizenship. **It would be no answer to say that thereby the former state was building up her local insurance companies and adding to the wealth of the state.**"

So in this case the tax imposed by **the Louisiana statute cannot be justified on the ground that Louisiana will thereby help its local independent merchants** (even if the record showed that such merchants would be helped, which, as we point out in another passage of this brief, it does not); **and it is no answer to the arguments upon the constitutionality of the statute to say that Louisiana is building up her local merchants and attempting thereby to add to the wealth or well-being of the State,** even if the legislation were in fact calculated to attain that end.

The rule laid down in the cases arising under the

14th Amendment finds its parallel in the tax cases arising under the commerce clause, of which perhaps the most recent instance is *Cooney vs. Mountain States Telephone & Telegraph Company*, 294 U. S. 384 (1935), where the court, through Chief Justice Hughes, said (p. 393):

> "Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; **that the amount exacted is not increased because of the interstate business done.** * * * "

So where a tax is imposed upon property or operations within the state, it must appear that it is imposed solely on account of the presence of such operations or property **and the amount exacted cannot be increased because of the existence of operations or property outside the state.**

In the case at bar, Louisiana can tax establishments and business in Louisiana, but it cannot increase its exaction because of establishments and business outside Louisiana; yet that is precisely what the Louisiana statute undertakes to do because it increases the tax levied against plaintiff and intervenors enormously solely because of the establishments which they have and operate outside the state.

***Maxwell vs. Bugbee*, 250 U. S. 525 and *Frick vs. Pennsylvania*, 268 U. S. 473**

The defendants relied in the court below upon *Maxwell vs. Bugbee*, 250 U. S. 525 (1919). That was a 5 to 4 decision, in which the dissenting opinion was written by Mr. Justice Holmes. In that case New Jersey asserted the right to levy an inheritance tax on stock in a New Jersey corporation belonging to a non-resident decedent. This

right was asserted upon the authority of prior decisions of this Court, particularly *Blackstone vs. Miller*, 188 U. S. 189 (1903). The New Jersey statute provided that in the case of a non-resident decedent the tax should first be calculated upon the basis of the tax that would have been due if all of the non-resident's property had been within New Jersey, and that the estate of a non-resident decedent should then be required to pay to New Jersey such proportion of the tax so calculated as the value of the property in New Jersey bore to the total value of all property of the estate. By a majority of one, this Court maintained the validity of the New Jersey statute against the objection that it amounted to taxing property outside the State. **The case has never been followed.** Since its decision, this Court has reversed *Blackstone vs. Miller*, upon the general authority of which *Maxwell vs. Bugbee* was rested, and has held that the state where a corporation is domiciled is without power to levy any inheritance tax whatsoever upon the stock of such a corporation belonging to a non-resident decedent. Thus, New Jersey today could no longer assert any inheritance tax whatsoever in the circumstances presented by *Maxwell vs. Bugbee*, and that decision is in effect a dead letter. See *Farmers Loan & Trust Company vs. Minnesota*, 280 U. S. 204 (1930); *First National Bank vs. Maine*, 284 U. S. 312 (1932); *Baldwin vs. Missouri*, 281 U. S. 586 (1930); *Beidler vs. So. Carolina Tax Commission*, 282 U. S. 1 (1930).

In his dissenting opinion in *Maxwell vs. Bugbee*, Justice Holmes said (250 U. S. at 544):

> "It seems to me that **when property outside the State is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what**

> **form of words may be used. It appears to me that this cannot be done, even if it should be done in such a way as to secure equality between residents in New Jersey and those in other States."**

In *Frick vs. Pennsylvania*, 268 U. S. 473 (1923) the court declined to follow *Maxwell vs. Bugbee*. In that case Mr. Frick died, domiciled in Pennsylvnia, leaving a large estate, of which a considerable portion was taxable personalty situated in New York and Massachusetts. Under the Pennsylvania statute, in calculating the amount of tax to be levied on the property in Pennsylvania, the taxing officers took into consideration the value of the property in New York and Massachusetts. The State Court sustained the tax on the authority of *Maxwell vs. Bugbee*. *In Re Frick's Estate*, 277 Pa. 242, 121 Atl. 35 (1923). The case was then taken to this Court on a writ of error. The State contended that the Pennsylvania tax was levied only upon property subject to its jurisdiction and that under *Maxwell vs. Bugbee* the State had a right to consider property outside of its jurisdiction in determining the amount of tax which it would levy upon the property wthin its jurisdiction. This Court rejected this contention, saying at pages 494 *et seq*:

> "One ground on which the state court put its decision was that, in taxing the transfer of the property which the decedent owned in Pennsylvania, it was admissible to take as a basis for computing the tax the combined value of that property and the property in New York and Massachusetts. Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the State had power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it

would have been had the State's power included what was excluded by the Constitution. This ground, in our opinion, is not tenable. **It would open the way for easily doing indirectly what is forbidden to be done directly, and would render important costitutional limitations of no avail.** If Pennsylvania could tax according to such a standard other States could. It would mean, as applied to the Frick estate, that Pennsylvania, New York and Massachusetts could each impose a tax based on the value of the entire estate, although severally having jurisdiction of only parts of it. Without question each State had power to tax the transfer of so much of the estate as was under its jurisdiction, and also had some discretion in respect of the rate; but none could use that power and discretion in accomplishing an unconstitutional end, such as indirectly taxing the transfer of the part of the estate which was under the exclusive jurisdiction of others. *Western Union Telegraph Co. vs. Foster*, 247 U. S. 105, 114, and cases cited; *Looney v. Crane Company*, 245 U. S. 178, 188; *International Paper Co. v. Massachusetts*, 246 U. S. 135, 141; *Air-way Corporation v. Day*, 266 U. S. 71, 81; *Wallace v. Hines*, 253 U. S. 66, 69; *Louisville and Jeffersonville Ferry Company v. Kentucky*, 188 U. S. 385, 395.

"The state court cited in support of its view *Maxwell v. Bugbee*, 250 U. S. 525, 539. **The case is on the border line, as is evidenced by the dissent of four members of the Court.** But it does not go so far as its citation by the state court suggests. The tax there in question was one imposed by New Jersey on the transfer of stock in a corporation of that State. The stock was part of the estate of a decedent who had resided elsewhere. The state statute, described according to its essence, provided for a tax graduated in rate according to the value of the entire estate, and required that where the estate was partly within and partly

without the State the transfer of the part within should bear a proportionate part of what according to the graduated rate would be the tax on the whole. The only bearing which the property without the State had on the tax imposed in respect of the property within was that it affected the rate of the tax. Thus, if the entire estate had a value which put it within the class for which the rate was three per cent, that rate was to be applied to the value of the property within the State in computing the tax on its transfer, although its value separately taken would put it within the class for which the rate was two per cent. **There was no attempt, as here, to compute the tax in respect of the part within the State on the value of the whole.** The Court sustained the tax, but distinctly recognized that the State's power was subject to constitutional limitations, including the due process of law clause of the Fourteenth Amendment, and also, that it would be a violation of that clause for a State to impose a tax on a thing within its jurisdiction **'in such a way as to really amount to taxing that which is beyond its authority."**

The decision in the *Frick* case was unanimous. It is difficult to draw any convincing substantial distinction between the result in *Maxwell vs. Bugbee* and the result of the *Frick* case. That was the view of the Supreme Court of Pennsylvania which thought the *Maxwell* case applicable in the *Frick* case and considered it equally possible in the *Frick* case to support the State tax in terms merely of imposing a greater amount of tax on what was within the State because of the fact that the decedent had left property outside the State.

In the court below defendants argued that *Maxwell v. Bugbee* was based on, and could still be supported by,

Kansas City R. R. v. Kansas, 240 U. S. 227. But that case rested upon the power of Kansas over a **domestic** corporation. The fact that the corporation was incorporated in Kansas gave Kansas complete power over it as a citizen. This was pointed out by Justice Holmes in the *Maxwell* case where he said (250 U. S. 544):

> "In *Kansas City, Fort Scott & Memphis Ry. Co. v. Kansas*, 240 U. S. 227, 235, the State could have refused incorporation altogether and therefore could impose the carefully limited condition that was upheld."

That the *Kansas* case rests entirely upon the power of Kansas over its own corporations is shown by the cases denying the State the right to levy a franchise tax upon a **foreign** corporation not measured by investments or operations within the State. See *Airway Electric Appliance Corporation v. Day*, 266 U. S. 71.

Even if the *Maxwell* case had not been discredited, it would not support the Louisiana statute. Even in the *Maxwell* case, New Jersey only undertook to tax the proportion of the total estate which could fairly be considered within New Jersey. The Louisiana statute goes much further. It puts all the Louisiana stores of a national chain in the highest applicable bracket. If Louisiana can do this, so can every other State. Every store everywhere would be taxed at the highest rates.

Moreover in the *Maxwell* case, there could be no question as to values of property which were reduced to uniform bases by a common denominator of valuations. This is not true under the operations of the Louisiana statute which treats all mercantile establishments, wherever located and whatever their character, as of equal value, an assumption arbitrary on its face and demonstrated to be so by the facts in the record.

(3) The Louisiana Statute Cannot be Supported on the Theory that Louisiana Taxes Only What is in Louisiana by Analogy to Allocation.

The cases permitting an allocation of values for application of franchise and income taxes do not involve any question of **rate** of taxation. The only problem they present is the determination of the *situs* or location of franchise or income. These are intangibles, the *situs* of which may be determined by the application of a fair formula, such as proportions of net income, gross sales and assets, in the absence of proof showing that the statutory formula produces an arbitrary result. In none of the allocation cases was an attempt made to increase the tax upon income, franchise or assets admittedly situated within the State because of the presence of income or assets admittedly situated outside the State, as is attempted by the Louisiana chain store statute involved in this case. In the case at bar there is no problem of determining the *situs* of the stores operated by the parties to this suit or of their operations in Louisiana because these have a physical and local existence.

The Louisiana statute cannot be sustained upon the theory that thereby Louisiana is taxing only the privilege of operating stores within its borders and that Louisiana has a right to regard the number of stores operated outside the state for the purpose of determining the value of the privilege of operating those within the state. Such was the contention of the defendants below. And in support thereof the case of *Wallace v. Hines*, 253 U. S. 66 (1919) was cited. That case not only does not sustain the validity of the Louisiana statute in the light of the undisputed facts disclosed by the record, but on the contrary condemns the Louisiana statute as a taking of property without due process of law.

In *Wallace v. Hines, supra*, there was involved a statute of North Dakota purporting to levy "a special excise tax upon doing business in the state". The subject of the tax was a railroad owning connected lines both within and without the state. In the administration of the law the value of the total property of the railroad was fixed by the total value of its stocks and bonds, and the proportion of such value that the main track mileage in North Dakota bore to the main track of the whole line was taken to represent the capital actually invested in the transaction of business in North Dakota, upon each $1,000 of which a special excise tax of 50¢ was imposed. The court in discussing the validity of this statute said:

> "But, * * * the circumstances are such as to make that mode of assessment indefensible. North Dakota is a state of plains, very different from other states, and the cost of the roads there was much less than it was in mountainous regions that the roads had to traverse. The state is mainly agricultural. Its markets are outside its boundaries, and most of the distributing centers from which it purchases are also outside. It naturally follows that the great and very valuable terminals of the roads are in other states. So, looking only to the physical track, the injustice of assuming the value to be evenly distributed according to main track mileage is plain. But that is not all.
>
> The only reason for allowing a state to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart,—not, in other words, to open to taxation what is not within the state. Therefore no property of such an interstate road situated elsewhere can be taken into account unless

> it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state. Hence the possession of bonds secured by a mortgage of lands in other states, or of a land grant in another state, or of other property that adds to the riches of the corporation, but does not affect the North Dakota part of the road, is no sufficient ground for the increase of the tax,—whatever it may be,—whether a tax on property, or, as here, an excise upon doing business in the state."

In this case, as in *Wallace v. Hines*, the statute undertakes to exact what purports to be a special excise tax upon doing business in the state. In this case in determining the quantity of the tax recourse is had to the number of establishments operated by each taxpayer everywhere, both within and without Louisiana. In the *Wallace* case in determining the quantity of the tax, recourse was had to the value of the stocks and bonds of the company regardless of the location of the property which represented the investment of its capital. In this case the operation of each establishment, wherever located and regardless of all other circumstances, is treated as equally contributing to the purchasing power and multiple advantages enjoyed by the operator of such establishments. In the *Wallace* case each mile of track was treated as representing equally the value of the capital invested. In this case the lower court found:

> "Operations of chains doing business in more than one store vary greatly from section to section and from state to state because of differences in local conditions, economic and otherwise, freight rates added to cost, remoteness from headquarters and executive management, increase in difficulty of supervision, local competition and other factors. Conditions as to sales and profits vary greatly in

all classes of stores according to the section of the country in which they are located. In almost every case operations in Louisiana are less than average for all stores operated by the particular company." (R. 266).

In the *Wallace* case because of the difference in the cost of construction of the railway in mountainous regions as compared to the plains of North Dakota, because of the location of distributing centers outside of North Dakota, because of the location of great and valuable terminals outside of North Dakota, the court held that the "injustice of assuming the value to be evenly distributed according to main track mileage is plain".

Here, the record shows that while in Louisiana the total annual sales per store of the complainant, The Great Atlantic & Pacific Tea Company, were $42,000, the average annual sales per store everywhere were almost $55,000, and in some instances such sales exceeded $125,000,—in one instance, $800,000 per store. In the case of Montgomery, Ward & Company the average annual sales of its five stores located in Louisiana were $184,803, while the average annual sales of similar Class B stores everywhere was $251,287 per store. In Montgomery, Ward Class A stores the average annual sales were $1,271,118. The average annual sales per store or establishment of the stores of Sears, Roebuck & Company varied from $11,887,080 for its mail order establishments, to $76,123 for its Class C stores, while the average annual sales of its stores in Louisiana varied from $2,667,000 for one of its Class A stores, to $68,691 for a Class B-1 store.

The record shows that the return on invested capital in almost every instance over a period of years and as to each of the appellants was less in Louisiana than upon the average from all stores. The record shows also that

the net annual earnings from operations in Louisiana represented a smaller percentage of sales than such net annual earnings everywhere. The record shows that conditions are less favorable to profitable merchandising operations in Louisiana, which is predominantly rural in character and a large portion of the population of which is negro. The record shows also that there is a wide variation in the class of merchandise sold as between states and sections of the country, and particularly as between Louisiana and foreign nations, because of local customs, tastes and desires, and because of the purchasing power of the community in which the establishments are located.

With these apparent differences disclosed by the findings of the lower court, and by the undisputed evidence, it must be the conclusion that (paraphrasing the language of this court in *Wallace v. Hines*) "so looking only to the number of establishments operated everywhere, the injustice of assuming the value, due to attributes or so-called advantages accruing from multiple ownership and operation of retail stores or establishments, to be evenly distributed, is plain" and does not justify the imposition of an increased quantity of tax in the State of Louisiana in which, from every standpoint, the value of the operation of the stores or establishments is shown to be inferior to the average. Thus under the reasoning and language of *Wallace v. Hines*, the statute of Louisiana is void because it constitutes "a taking of property without due process of law".

Wallace vs. Hines is but one of many cases in which this court has applied the rule that in the application of a statute based upon an allocation theory, it is essential for the State to show that the statute prescribes a fair formula of allocation for determining what is actually within the

state, else the statute will be bad as taxing property or operations outside the state in violation of the 14th Amendment.

The leading case is *Western Union Telegraph Company v. Kansas*, 216 U. S. 1 (1909). In that case the statute required a foreign corporation, as a condition of its right to do local business in Kansas, to pay a fee based upon a percentage of its total authorized capital, and in holding such statute violative of the Fourteenth Amendment, the court said (page 30):

> "Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the Telegraph Company, as a charter fee, of a given per cent *of its authorized capital* representing, as that capital clearly does, *all* of its business and property, both within and *outside of the state, a condition* of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the State, but a burden and tax on the company's interstate business and on its property located or used outside of the State."
>
> (Italics by the court).

Similar decisions were rendered in *Ludwig v. Western Union Telegraph Company*, 216 U. S. 146 (1910); *Pullman Company v. Kansas*, 216 U. S. 56; and *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U. S. 280 (1912).

In *Looney v. Crane*, 245 U. S. 178 (1917), the court had under consideration Texas statutes which required foreign corporations to pay permit and franchise taxes calculated according to authorized capital stock, and declared them in conflict with the Federal Constitution because they imposed "direct burdens on interstate commerce, and, moreover, asserted the taxing authority of

the state over property and rights which were wholly beyond the confines of the state and not subject to its jurisdiction, and therefore constituted a taking without due process".

In *International Paper Company vs. Massachusetts*, 246 U. S. 135 (1918) a similar Massachusetts statute was set aside. In summarizing the law as established by previous decisions the Court said (page 142):

> "A license fee or excise of a given per cent of the entire authorized capital of a foreign corporation doing both a local and interstate business in several States, **although declared by the State imposing it to be merely a charge for the privilege of conducting a local business therein,** is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other States; and this because the capital stock of the corporation represents all its business of every class and all its property wherever located.
>
> "When tested, as it must be, by its substance —its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce and **also as wanting in due process because laying a tax on property beyond the jurisdiction of the State.**"

In *Airway Corporation vs. Day*, 266 U. S. 71 (1924) this court declared void an Ohio statute which calculated a franchise tax upon authorized capital stock notwithstanding the fact that the statute provided for the calculation of the tax solely upon the proportion of the authorized capital stock represented by property owned and used and business transacted in the state.

In *Cudahy Packing Company v. Hinkle*, 278 U. S. 400, the court had under consideration a statute of Washington requiring corporations to pay annual license fees not above $3,000, reckoned on a graduated basis of authorized capital stock. The Packing Company had an authorized capital stock of $45,000,000, less than $30,000,000 of which had been issued. Its property in the State of Washington had a value of $40,000 and its sales in the year under consideration everywhere aggregated more than $231,000,000, of which slightly in excess of $1,000,000 were made in the State of Washington. In holding that the tax so enacted under the Washington statute violated the Fourteenth Amendment because imposed upon property beyond the state's jurisdiction, the court had occasion to quote from its previous decision in *Alpha Portland Cement Company v. Massachusetts*, 268 U. S. 203 (1925) as follows;

> "It must now be regarded as settled that a State may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the Commerce Clause; and the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved."

In the court below defendants relied upon and cited as authority sustaining the Louisiana statute, the case of *Baltic Mining Co. v. Massachusetts, supra*, which, it will be observed from the following quotation, has been expressly overruled.

In *Hans Rees' Sons vs. North Carolina*, 283 U. S. 123 (1930), the Court held:

> "The method of allocating, for taxation, to a State that part of the net income of a foreign corporation which bears the same ratio to its entire net income as the value of its tangible property within that State bears to the value of all its tangible property, works an unconstitutional result if, in the particular case, the part of the income thus attributed to the State is out of all appropriate proportion to the business there transacted by the corporation. * * * * *
>
> "The fact that a corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as 'component parts of a single unit' so that the entire net income may be taxed in one State regardless of the extent to which it may be derived from the conduct of the enterprise in another State."

This case emphasizes the need for a formula reasonably adapted to produce a fair allocation. A manufacturer's tax could not be allocated on the basis of the number of factories within and without the state regardless of the size of the various factories or of their location. So merely counting the number of stores as proposed by the Louisiana statute (where it is shown that the stores are not fungible and where they are situated anywhere from across the state border to across the Atlantic Ocean) is not a formula calculated to meet the requirements of the decision in the *Rees* case or in any of the other allocation cases. Allocation is merely a means of determining what property or operations are within a state so as to be subject to its taxing power. This can be done only by a

formula fairly calculated to determine what is within the state. The challenged statute here prescribes no such formula. In looking beyond the borders of the state, no weight is given by the statute to location or character of establishments operated outside the state. An individual or company which operates 1 establishment in Louisiana will have its taxes in Louisiana increased as much by the acquisition of an establishment in Canada or Germany as by the acquisition of an establishment in an adjoining state. The liability to increased tax in Louisiana is the same whether the establishments acquired or operated outside the state are of the same character as the establishment in Louisiana or of a widely dissimilar character. The statute does not attempt to ascertain any relationship between the establishment or establishments in Louisiana and those outside Louisiana, or to make Louisiana's right to taxes depend upon proof of such relationship.

If the Woolworth Company operates an additional store in Germany, Louisiana asserts the right to increase its Louisiana taxes to the same extent as if the additional store were opened in an adjoining state, although the effect upon Louisiana operations of a store in Germany would certainly be far more remote than the effect of a store in an adjoining state.

Under the Louisiana statute, if an individual operated a drugstore in Louisiana and thereafter acquired a millinery store in New York, the drugstore in Louisiana would then be subject to a chain store tax, although the ownership by the same individual of a millinery store in New York could have no possible effect upon the operation of a drugstore in Louisiana.

Similarly, under the Louisiana statute, if a company operates 100 grocery stores in Louisiana and the same

interest, through a subsidiary, opened a retail drygoods store in New York, Louisiana would have the right to demand additional taxes from the company upon each of the grocery stores in Louisiana, notwithstanding the fact that the operation of the drygoods store in New York had no economic bearing upon the grocery stores in Louisiana. *A fortiori* the statute does not take into account any difference between operations in Louisiana and those in other parts of the world, although it is necessarily admitted that such conditions vary widely even from state to state, much more from country to country. See paragraph IX of the Findings of Fact (R. 266), quoted *supra*, at page 34.

This arbitrary phase of the Louisiana statute is specially illustrated by its application to the operations of Montgomery, Ward & Company and Sears, Roebuck & Company, two of the intervenors in this case, whose operations vary widely in character from state to state as well as within the state. These companies operate (a) a few large mail order houses, (b) some mercantile establishments where orders are taken but no stocks carried,[1]

[1]That the Louisiana statute applies not only to ordinary stores but to all establishments is shown by the recent opinion rendered by the Attorney for the Collector of Revenue, September 30, 1936, reported in *Corporation Trust Company Louisiana Tax Service*, paragraph 44-501 to the effect that:

> "Corporations engaged, at different points in the state, in the business of owning and operating ice plants in connection with which ice boxes, ice refrigerators, etc., are sold at retail under the same general management, ownership or control are subject to the chain store tax law."

An ice plant would not ordinarily be considered a store but would nevertheless fall within the general language of the Louisiana statute.

(c) a few large department stores carrying complete lines of general merchandise, and (d) many small stores entirely different in character from the department stores, handling in some instances only automobile tires, hardware and household appliances. The Louisiana tax upon the department store in New Orleans is fixed by reference to the number of mercantile establishments operated everywhere in the world without regard to the character of the operations, and is therefore fixed by the number of stores operated in New York City or Boston selling only automobile accessories or household appliances, as well as by the establishments filling orders through the mail and those where only mail orders are taken. The Louisiana statute gives the same effect in determining the Louisiana tax to a large mail order establishment situated in Chicago or Dallas as it does to a store in New York selling only automobile accessories and household appliances.[2] In the case of the complainant, the same effect is given in fixing the Louisiana rate of taxation, to a store in an adjoining state with one employee and annual sales of $13,500 as to a store at the opposite end of the country having twenty employees and annual sales of $800,000.

An Opinion of the Attorney General of Louisiana Impliedly Recognizes the Arbitrary Character of the Louisiana Statute as Written.

The arbitrary character of the Louisiana statute and the impossibility of supporting it as written is impliedly recognized in an opinion of the Attorney General of Louisiana rendered to the Supervisor of Public Accounts in

[2]The effect of the Louisiana statute upon the interstate commerce business of the mail order houses is discussed in a separate brief filed for Montgomery, Ward & Company.

November, 1936, reported in Prentice Hall Louisiana Tax Service, paragraph 44045, reading as follows:

> "Stores Under Single Ownership but Selling Different Classes of Goods are not a Chain.
>
> "The main advantage that one would have from operating a number of stores would be the purchasing power and privileges. For instance, a person operating several grocery stores would purchase flour, lard and other commodities in carload lots, thereby getting better prices, cheaper freight rates and handling charges. This would not be true of the person who owns several stores, if each store handles a different class of goods or merchandise.
>
> "Certainly, if a department store is not considered a chain, where the various departments carry different kinds of merchandise just the same as different stores carry different articles, then the owner and operator of several stores, each store carrying a separate and distinct line of merchandise, should not be considered as operating chain stores. Op. Atty. Gen. to Sup. Pub. Accts., Nov. 24, 1936."

This construction of the statute cannot be justified by anything in its language. The Attorney General's opinion is an admission of the arbitrary character of the Louisiana statute as written. The statute makes ownership the test regardless of character of stores. The Attorney General's attempt to read into the statute a limitation as to character of stores is as ineffective as would be an attempt to read into it a limitation as to location of outside stores. No such distinctions are contained in the law, and the court must take it as written. *Cf. Lewis Publishing Company vs. Morgan*, 229 U. S. 288 (1913); *Iselin v. United States*, 270 U. S. 245 (1926). The statute as written proceeds upon the proposition that all stores and mercantile establishments are fungible and that the

tax is to be determined solely by reference to the number of establishments without regard to their character. The Attorney General's opinion was based upon his recognition of the "unjustifiable, unequal, whimsical and arbitrary" operation of the Louisiana statute if construed as written (we use the language of this court in *Stewart Dry Goods Company vs. Lewis*, 294 U. S. 550, where the court struck down a Kentucky statute having such a result). The opinion is quite inconsistent with the contention in this case that the Louisiana statute applies to Sears Roebuck & Company and Montgomery Ward & Company, because some of their establishments are really in different lines of business from others. But the unjust and arbitrary quality of the Louisiana statute may be said to be only more obvious in the case of Sears and Ward than in the case of the other parties to this suit, not more basic, because there are wide differences between the Louisiana establishments of the other parties to this suit and their establishments outside Louisiana.

In discussions of chain stores and taxes applying thereto, it is customary to speak of "units". That term is a standard of comparison which implies an equality among the things compared. Obviously, a Ward Class "C" store selling only hardware and automobile tires is not comparable to a mail order establishment. An A. & P. store in Louisiana having one employee and annual sales of $13,500 is not comparable to an A. & P. store in New York having twenty employees and annual sales of $800,000.

The reason the Louisiana statute possesses such an inherently arbitrary character which would not be true of the ordinary chain store statute is because the Louisiana statute extends its orbit outside the state. Where the operation of a statute is confined to what is done within

the state, it will not ordinarily be found that the operations of one owner vary so widely, or that one establishment conducted by him differs so greatly in character from another. But when the entire nation, and indeed the world, is taken as the basis for the statute's operation, one may expect to encounter the great dissimilarities in character of operation by the same owner from state to state and country to country which this record illustrates.

The Louisiana Statute Increases the Louisiana Tax When Louisiana Operations Decrease if Outside Operations Increase. This Could Never Happen Under an Allocation Statute.

Under statutes providing for determining the *situs* of income and franchise by allocation, it is never possible for the rate of tax in one state to be increased merely by increase in income and investments outside the state, while the business and income in the taxing state remains stationary. On the contrary, under such statutes, if investments and income outside the state increase while income and investments in the taxing state remain stationary, the tax in the state will decrease because that much smaller a proportion of total income and investments will be allocated to the taxing state. **The Louisiana chain store tax statute works just the other way.** When operations outside the state increase, Louisiana puts up its tax on what is in Louisiana, although the operations in Louisiana remain unchanged. Indeed, as noted *supra* at page 39, **it is possible under the operation of the Louisiana state, for Louisiana to increase its tax although the number of stores and the extent of operations in Louisiana actually decrease.**

This consideration is, we submit, a complete

demonstration that the Louisiana statute does not proceed upon the theory of allocation and cannot be supported upon that theory. What Louisiana is attempting to do under the challenged statute is not to find out what is in Louisiana and tax that but, in effect, to reach out and subject to the tax in Louisiana what is not there. Whenever such a result has been attempted this Court has struck the attempt down. Compare *Fargo vs. Hart*, 193 U. S. 490 (1904); *Union Tank Line vs. Wright*, 249 U. S. 275 (1919).

The Louisiana Statute Places All Stores Everywhere in the Highest Applicable Brackets.

The absence of any allocation feature from the Louisiana statute of 1937, (which unlike the 1932 statute, is retrogressive) is further illustrated by the fact that, while it purports to establish 16 classes, it puts into the highest applicable bracket each Louisiana store of every corporation also owning stores outside Louisiana.

If Louisiana has a right to do this, then every state has a similar right, and although a corporation owned only 1 store in every state, **that store would be in the highest bracket everywhere.**

If the Louisiana statute is upheld, in pursuance of the policy of exclusion from the state, the brackets of classification may be changed so as, for example, to impose even more nominal taxes on stores falling within the lower brackets and even higher taxes on stores in the higher brackets as a result of the provision that where a corporation operates stores in more than one state, all of the stores in the taxing state shall be put in the highest brackets. Upon the adoption of such a statute in every state, the exclusion from the state of a corporation

operating in more than one state would be even more effectively assured than under the brackets and rates of the present Louisiana statute.

(4) The Louisiana Statute Denies the Equal Protection of the Laws to Chains Operating Both Within and Without Louisiana. The Statute was Not Designed to, and Does Not, Protect Independents Against Chains but Discriminates Among Chains.

The effect of the challenged statute is to greatly reduce the taxes payable by chains operating only or chiefly in Louisiana. Hill Stores operating 87 stores paid under the 1932 statute $200 per store on all stores in excess of 50. Under the 1934 statute, this company pays a tax of $30 on each store. Its total taxes under the 1932 statute were $10,200, while under the 1934 statute, they are $2,610.

Morgan & Lindsey operating 28 stores in Louisiana paid under the 1932 statute $980, while the 1934 statute requires them to pay only $355.

Katz & Besthoff, Ltd., operating 10 drugstores paid under the 1932 statute $200 and under the 1934 statute $100.

These results repel any suggestion that the purpose of the Louisiana statute was to protect the independent merchant against the chains. As a matter of fact the 1934 statute reduced the protection which the operator of one store in Louisiana previously had against such a considerable chain as Hill Stores because it tremendously reduced the differential advantage which, under the 1932 statute, the independent merchant operating 1 store had as compared with Hill. What purpose does it serve to protect the independent from the competition of The Great Atlantic & Pacific Tea Company if his protection as against Hill Stores is so heavily reduced? How would

it advantage the independent by the operation of the 1934 statute to force The Great Atlantic & Pacific Tea Company out of the State, when the only result could be to leave him with less tax protection as against Hill Stores than he previously had? The record shows that Hill Stores do a very much greater gross volume of business in New Orleans as well as a very much greater volume of business per store than does The Great Atlantic & Pacific Tea Company. See paragraph IV of the Findings of Fact (R. 264) quoted *supra* at pages 34, 35.

The Louisiana statute is upon the record obviously not inspired by a desire to protect the independent merchant and could not be supported by any supposed public policy to that end.

It seems in this connection significant that the Louisiana statute is so drawn as to make the first sharp increase in rates only when the number of stores exceeds 100 (Hill has 87).

The foregoing comments apply with substantially equal force to the effect of the challenged statute upon the operations of Katz & Besthoff, Ltd., a local drug chain operating 10 stores in Louisiana as against 6 operated by Liggett. See paragraph XIV of the Findings of Fact (R. 267) quoted *supra* at pages 35, 36.

The intervenor Liggett Drug Company is required under the challenged statute to pay a tax 50 times as great as that of a Louisiana competitor who operates almost twice as many stores in Louisiana as it does, and does more than twice the business. These differentials result solely from the effect given by the Louisiana statute to operations outside the State.

The only privilege which Louisiana gives is that of

operating stores in Louisiana. Louisiana gives Liggett the privilege of operating in 6 places in the State. Katz & Besthoff enjoys the privilege of operating at 10 points in the State. Yet Louisiana charges Liggett aggregate taxes of $3,000 and charges Katz & Besthoff only $100. Louisiana would charge Liggett $500 for operating 1 store in the State, while Katz & Besthoff has the privilege of operating 10 stores in the State for one-fifth of the charge against Liggett for operating 1 store. Katz & Besthoff could operate stores at 100 points in Louisiana for the amount which the State charges Liggett for the privilege of operating at 6 points in Louisiana. To operate 100 stores in Louisiana would cost Liggett $50,000 as against $3,000 to Katz & Besthoff. For the privilege of reaching the number of people that 6 stores in Louisiana can reach, Liggett pays $3,000; Katz $60.

The facts reviewed under this heading show the lack of foundation for the justification of the Louisiana statute urged by a member of the Louisiana Legislature in his affidavit (R. 252) in which he recites that the purpose of the 1934 Louisiana statute was to protect independent retailers against chains, saying:

> "Affiant further states that when an individual citizen of Louisiana is unable to operate by reason of chain operations in his respective community, such a condition operates against the general welfare of the State of Louisiana and is a condition which the Legislature of Louisiana should take cognizance of and rectify, and it was these conditions and circumstances that the Legislature had in mind in the passage of the Act attacking the present litigation."

The record shows that the number of independent retailers in Louisiana has decreased less than the number

of chain units. But if the independent retailer needs protection against chains, the protection he requires is against the local chains at least as much as the foreign chains. The new Louisiana statute relaxes that protection and actually gives Hill Stores, for example, a far greater leverage in competition against the independent retailer than was the case under the 1932 statute under which Hill paid graduated rates ranging up to $200 for every store in excess of 50 whereas under the 1934 statute, it pays only $30 per store.

That the competition against which the independent merchant of Louisiana desires to be protected is the competition of the local chain rather than of the large chain is shown by the affidavit of Mr. A. A. Allen of Baton Rouge (R. 202), offered by the defendants, in which he complains of the methods of competition used by a chain which the record otherwise (R. 95) shows to be a **local** chain operating **solely in Louisiana** with 17 stores in Baton Rouge, (as compared with plaintiff's 6 stores). This local chain is actually benefited and strengthened in its competition with independent merchants such as Mr. Allen by the provisions of the 1934 statute as compared with those of the 1932 statute.

In our analysis of the testimony, we have pointed out that the rate of tax on the Great Atlantic & Pacific Tea Co. per store in Louisiana is almost 20 times the rate of tax on Hill Stores. Similarly the rate of tax on each Louisiana store of Liggett is 50 times the rate of the Louisiana tax on Katz & Besthoff and the rate of tax on each of the Penney and Woolworth stores is almost 30 times the rate of tax on each Morgan & Lindsey store although Morgan & Lindsey operate 28 stores in Louisiana as compared with 14 stores operated by Woolworth and

8 operated by Penney. H. L. Green Company pays 5 times the tax on its Louisiana store that Morgan & Lindsey pay on each of their Louisiana stores although Morgan & Lindsey operate 28 times as many stores in Louisiana as Green. The record fails completely to show any advantages or differences in method of operation as between Hill and the Great Atlantic & Pacific Tea Co. which would support a differential of almost 20 times in tax or a discrimination between Liggett and Katz & Besthoff of 50 times in tax or even a discrimination between Green and Morgan & Lindsey of 5 times in tax, even if the State were conceded the right in effect to tax operations outside its borders by making them the controlling test in determining the rate of taxation upon operations within its borders.

The following table summarizes the number of stores operated in Louisiana of certain of the parties to this litigation and certain of their competitors and the taxes payable by them respectively under the Louisiana statute.

	Number of Stores	*Total Taxes*
Great Atlantic & Pacific Tea Company	106	$58,300
Hill Stores	87	2,610
Liggett Drug Company	6	3,000
Katz & Besthoff	10	100
F. W. Woolworth	14	7,700
Morgan & Lindsey	28	560

The fact that Hill Stores is successfully operating 87 stores in New Orleans in competition with the 63 operated by the A. & P. in that city, is in itself sufficient to refute the contention that a national chain can drive a local chain out of existence. The same comment applies to the 10 drug stores of Katz & Besthoff and the 15 stores of Economical Drug Stores operated in competition with

Liggett, as well as to the 28 stores operated by Morgan & Lindsey in competition with various intervenors in this case. The effect of a statute like the Louisiana statute is merely to give further opportunities for greater profit to these already thriving local chains. But the State cannot consistently with the Constitution undertake to benefit or give advantage to its citizens or those doing business only within its borders by discriminating against those who also do business elsewhere. *Ward v. Maryland*, 12 Wall. 418, 430, cited with approval in *Colgate v. Harvey*, 296 U. S. 404, (1935) *supra*.

(5) If the Louisiana Statute is Upheld, a State May Make Its Tax Rates Applicable to Income and Operations Within the State Depend upon Factors Outside the State. The Result Would be to Permit the State in Effect to Exclude from the State Persons or Corporations Operating Outside the State, and to Convert the Union into a Confederation of States.

The argument of defendants is that the complainant and each of the intervenors enjoys a more valuable privilege in Louisiana by operating a limited number of stores there because of the ownership of other stores elsewhere. If this argument is sound, then it may be equally argued that the Louisiana business of a New York life insurance company is more valuable than the Louisiana business of equal extent of a local insurance company which does no business outside Louisiana. A Louisiana life insurance company doing business in Louisiana and collecting $500,000 in premiums there might be required to pay a rate of only 2% upon such premiums, while the New York insurance company also collecting $500,000 in premiums accruing in Louisiana but $5,000,000 of income accruing outside of Louisiana might be required to pay Louisiana 10% upon its Louisiana income on the theory

that it was more valuable to have a $500,000 business in Louisiana if the business was part of a $5,000,000 total than if the business was not part of such a total.

If Liggett's 6 units in Louisiana are more valuable than the 10 Louisiana units of Katz & Besthoff (notwithstanding the fact that Katz & Besthoff does a much greater volume of business, makes much more money and enjoys every buying advantage that Liggett enjoys) merely because Liggett operates also other stores outside Louisiana, then why is it not equally true that a $500,000 business in Louisiana of Metropolitan Life Insurance Company is more valuable than an equal amount of Louisiana business of a local life insurance company, solely by virtue of the fact that the Metropolitan Life Insurance Company has a large business outside of Louisiana? It is, if anything, more likely that the Louisiana offices of the Metropolitan Life Insurance Company benefit from the extensive business that that company does in other states than that the Louisiana units of Liggett, for example, benefit from the outside units of Liggett, or that the Louisiana units of Woolworth benefit from the Woolworth units existing in Germany, Great Britain, Cuba and Canada.

If Louisiana can determine the rate of taxation upon a corporation like Woolworth having 14 stores in Louisiana by reference to the stores which Woolworth operates outside Louisiana, what logical reason may be found to preclude Louisiana from taxing the income of Woolworth in Louisiana at a higher rate than would be applied to an equal amount of income accruing in Louisiana to a corporation which had no income outside Louisiana solely because of the fact that Woolworth had large income accruing outside Louisiana? It is argued in behalf of the Louisiana chain store statute that it is a tax against size

designed to compensate the small chain for the advantages which the large chain enjoys. If the tax is to be maintained on the theory of permissible discrimination against size, notwithstanding the fact that the size results from operations outside the State, then no reason suggests itself why the discrimination against size should not be carried to a further extent by permitting a State to provide that income accruing within a State should be taxed at a higher rate to a corporation which has large sources of income from outside the State than would be permitted in the case of a corporation which had only an equal amount of Louisiana income and no income from outside the State. So also if each State is to be permitted to penalize size resulting from operations outside its borders, there would seem to be no logical reason why a State should not be permitted to tax capital of a corporation invested in the State at a higher rate because of the fact that the corporation has large capital outside the State.

In such cases the same argument might be made as is made in support of the challenged Louisiana statute in this case, namely that it is a greater privilege to be permitted to do business in Louisiana if you do a large business outside Louisiana than if you do not because of the advantages of reduction in overhead expenses and other gains contended to result from size. Similarly it would appear that, if the present Louisiana chain store statute is valid, Louisiana might amend its general license tax law, which provides for graduated license taxes on gross sales within Louisiana, so as to fix the rate of such taxes by reference to the total sales of the seller outside Louisiana. Thus a corporation selling $100,000 of goods in Louisiana for one year, but which had gross sales of $1,000,000 for its entire system, might be required to put

its sales in the upper brackets of a graduated license tax with the result that it would be required to pay general license taxes far exceeding those payable by a corporation which sold $100,000 worth of goods in Louisiana and had not sales elsewhere. The theory on which it is contended that the present Louisiana chain store tax law can be supported, namely that one conducting extensive business outside Louisiana derives a greater privilege from doing business in Louisiana than one who does not, and that the Louisiana operations of the outside operator are more valuable than the Louisiana operations of one who confines his activities to Louisiana, would be equally applicable to the case of a license tax upon sales.

Granting the purpose of the Louisiana statute to destroy large chains by taxation which discriminates against size resulting from operations outside the state, a corresponding purpose would be served by applying the Louisiana theory to license taxes as well as to taxes on insurance premiums, franchise taxes and every kind of privilege tax because it might as to all such taxes equally be argued that an individual or corporation doing business in a number of states has supposed advantages which every state should be permitted to remove by taxation based upon the entire extent of the operations of the corporation or individual.

This Court has, in a series of decisions, referred to *supra*, denied the power of a state to calculate a franchise tax by reference to all the capital stock of a corporation representing all of its business and property both within and without the state, and has rejected the contention that such taxes should be upheld on the theory that the state had a right to impose taxes so calculated as a condition upon the right of the corporation to do business

within the state. But, if it is true that the value of the privilege of doing business within the state is greater because of operations outside the state, it would seem that these cases were wrongly decided; the state is not required to adjust taxes with precision, and if it is more valuable to a large corporation to do business in Louisiana than it is to a small corporation, then in the cases referred to, the taxes should have been upheld. A contrary decision was, however, reached in each of the cases in which the point was presented.

If a state may exclude by discriminatory and confiscatory taxation any corporation which has extensive operations outside the state, each state will then exist for itself and the Union will become a Confederation of States, each of which may erect an economic wall parallelling its boundaries. Such a result will be as destructive of the theory of our national government as any interference by individual States with the flow of commerce between them could be. In *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935), holding that New York was without power to prohibit the sale in New York of milk purchased in Vermont if the price paid for it in Vermont was less than would be owing in like circumstances to farmers in New York, Mr. Justice Cardozo said:

> "Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. * * * 'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business.' * * * ** Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of

the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.' * * * If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation. * * * * Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. **To give entrance to that excuse would be to invite a speedy end of our national solidarity.** The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division. * ** * **What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.** Formulas and catch words are subordinate to this overmastering requirement. * * *"

The case cited involved a principle which underlies our whole government structure and is equally applicable whether the case arises under the commerce clause or under the 14th Amendment, and the language of Justice Cardozo just quoted is in substance directly applicable to the situation which would result from recogniz-

ing a right in a State to fix its rates of taxation on property within its borders by reference to property outside its borders. The argument in the instant case that Louisiana is entitled to protect local chains against competition with national chains corresponds to the argument in the case cited that New York should be permitted to protect the economic welfare of her farmers against competition with the cheaper prices of Vermont. If the Constitution was

> **"framed upon the theory that the people of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division,"**

a statute framed upon the theory and designed for the purpose of the Louisiana statute cannot be maintained.

In considering the argument in this case that Louisiana is justified in discriminating against size, even where the size results from operations outside its borders, it should be borne in mind that this Court has held that a tax based upon size alone, as e.g. a graduated tax upon gross sales, is arbitrary and invalid; see *Stewart Dry Goods Company vs. Lewis*, 294 U. S. 550 (1935), where the Court said at page 560:

> "If, as argued, larger merchants are more efficient, their efficiency will be correspondingly reflected in their net earnings. If, as claimed, they are able to procure better management, a tax upon gains will uniformly reflect the effects of such management. And the same principle holds true of every advantage said to inhere in the magnitude of a business."

Stripped to the ultimate point, this case involves this question: May a state exclude a foreign corporation from

doing business in the state because of the extent of its operations outside the state? May a State say to a large corporation: "We prefer not to have within this state a corporation which operates extensively outside the state. The operation of such a corporation within the state will make competition difficult for our local corporations, and we prefer that the local corporations should enjoy the local field exclusively."

The maintenance of the Louisiana statute involved in this case will require an affirmative answer to this question. It will also require an affirmative answer to the same question when applied to an individual conducting extensive operations outside the State. The State may exclude him also by calculating its taxes upon his outside operations. The Louisiana statute expressly applies to individuals.

The Right of Louisiana to Exclude a Foreign Corporation Cannot Be Used as a Basis for Taxing it Upon Property that, By Established Principles, the State Has No Power to Tax.

Defendants in the lower court contended that since the complainant and each of the interveners in this case are foreign corporations doing intrastate business in Louisiana, the privilege of engaging in such business in corporate form is one which the state may confer or withhold as it sees fit, that the state had the right to impose as conditions to doing such intrastate business in Louisiana the terms of the Louisiana statute challenged. This contention is not new and has heretofore been directly denied by this Court. In *Fidelity & Deposit Company of Maryland v. Tafoya*, 270 U. S. 426 (1926), this Court said:

> "Coming then to the merits, we assume in favor of the defendants that the State has the

> power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some instances become wrong. * * * **Thus the right to exclude a foreign corporation cannot be used * * * to tax it upon property that by established principles the State has no power to tax.** * * * "

In *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389 (1928), this Court had under consideration a Pennsylvania statute imposing a tax of 8 mills upon the dollar upon all gross receipts realized by any transportation company from passenger and freight traffic wholly within the state. Plaintiff was a New Jersey corporation, authorized to do and engaged in a general taxicab business in Philadelphia. It was competing generally with both individuals and partnerships operating taxicabs in that city. The court held that the statute, taxing the gross receipts of plaintiff and exempting those of its competitors, denied to plaintiff the equal protection of the law, contrary to the 14th Amendment, and, speaking by Mr. Justice Roberts, said (p. 400):

> " * * * It is established that a corporation, by seeking and obtaining permission to do business in a State does not thereby become bound to comply with, or estopped from objecting to, the enforcement of its enactments that conflict with the Constitution of the United States. **The right to withhold from a foreign corporation permission to do local business therein does not enable the State to require such a corporation to surrender the protection of the Federal Constitution.** ***Power Co. v. Saunders, supra, 497. Hanover Insurance Co. v. Harding, 272 U. S. 494, 507. Frost v. Railroad Commission, 271 U. S. 583, 593, et seq. Fidelity***

& Deposit Co. v. Tafoya, 270 U. S. 426, 434. Western Union Tel. Co. v. Foster, 247 U. S. 105, 114. Looney v. Crane Co. 245 U. S. 178, 188., Sioux Remedy Co. v. Cope, 233 U. S. 197, 203."

Prohibition of Size Extending to Operations Outside the State may Properly be Accomplished Only by National Legislation.

It may be argued that discrimination against size is wise and that a legislative policy to that end should not be interfered with by the Court. But under our system of government, it is not within the power of a state to control anything but what takes place within its borders. If size transcends the borders of the state, the remedy is in national, not state legislation. The national legislative power may be exerted through the exercise of the power over interstate commerce. The activities of the Federal Trade Commission in its investigation of chain stores and the recent enactment by Congress of the Robinson-Patman Act prohibiting price discrimination (Act of June 19, 1936, Public No. 692, 15 USCA Sections 13, 13-A) are immediate illustrations of the exercise of national power over chains. Insofar as there is any legitimate complaint against undue advantage in purchases by large chains like The Great Atlantic & Pacific Tea Company, Congress has undertaken to apply a remedy which it deemed to be required. From no standpoint is there any justification for the unwarranted extension of state power. The diference between the power of the state and the power of the United States was pointed out by this Court in *United States vs. Bennett*, 232 U. S. 299 (1913), at page 306, where the Court said:

> "* * * ** The application to the States of the rule of due process relied upon comes from the fact that their spheres of activity are enforced and pro-

tected by the Constitution and therefore it is impossible for one State to reach out and tax property in another without violating the Constitution, for where the power of the one ends, the authority of the other begins. * * * *."

If the Louisiana Statute is Valid, Municipalities May Adopt Corresponding Ordinances Based on Operations Outside State, Further Assuring Exclusion of Foreign Chains.

Under the constitution and laws of Louisiana, any municipality in which a corporation does business may establish a license tax not exceeding the license tax of the State. If the 1934 Louisiana statute is upheld, then the City of New Orleans may adopt a similar ordinance taxing the plaintiff in this case by the number of stores which it operates in the world so that the tax per store upon the plaintiff would then become $1,100.00 while the tax per store upon Hill Stores would be $60.00. A corresponding result may be reached by each municipality throughout the State in every town where the plaintiff and each of the intervenors do business. This is merely cumulative evidence of the fact that a judicial declaration of the right of the State to fix taxes upon property and operations within its borders by reference to property and operations outside its borders will in effect constitute a declaration of the right of each State to restrict business within its borders to those who operate only within those borders and to exclude all others. What may happen in Louisiana may also happen through the country because the right of municipalities to enact chain store ordinances exists in many States. In at least one city outside Louisiana, an ordinance modeled upon the Louisiana statute had already been proposed prior to the submission of this case in this Court.

Every Legitimate Claim of Louisiana to Lay Tribute Upon Operations Within its Borders is Attained Under the State Income and Franchise Tax Laws, the 1932 Chain Store Act, and the General License Tax Laws.

Every legitimate claim which the State of Louisiana may have to lay tribute upon the operations by plaintiff and intervenors within its borders, is satisfied by the State income tax law, the State franchise tax law, the general retail license tax law and a chain store tax based upon operations within Louisiana.

Louisiana has an income tax statute (Act 21 of the Louisiana Legislature of 1934 amended by Act 7 of the Second Special Session of 1934 and Act 21 of the First Special Session of 1935). Every one of the corporations which is a party to this suit is subject to the provisions of this income tax statute. Section 34 of this statute provides for the allocation of income of foreign corporations to sources within or without the State of Louisiana under rules and regulations prescribed by the Supervisor of Public Accounts. The rules and regulations so prescribed permit a foreign corporation to make its own allocation of income on a fair and equitable basis and provide in the alternative for a statutory allocation of total income based upon that proportion of income which Louisiana tangible assets, wages and sales bear to total such items. See regulations appearing at page 1155-25 of Corporation Tax Service for Louisiana. Insofar as the plaintiff and intervenors in this case derive income from sources in Louisiana, the Louisiana income tax statute reaches such income.

Louisiana has also a franchise or capital stock tax statute, originally adopted as Act No. 8 of the Legislature

of 1932 amended by Act 18 of 1934 and further amended by Act 25 of the First Special Session of 1934, Act 20 of the Third Special Session of 1934 and Act 10 of the First Special Session of 1935. This statute provides for an allocation to Louisiana of that proportion of a foreign corporation's capital stock which may be obtained by taking the arithmetical average of (a) ratio of property and assets in Louisiana to total assets and (b) ratio of volume of business done in the State to total volume of business. The plaintiff and intervenors are also subject to the provisions of this statute and, insofar as their capital stock has a *situs* in Louisiana, it is taxed under this statute.

Neither the income tax statute nor the capital stock tax statute undertakes to increase the rate of tax upon income accruing in Louisiana or capital stock situated in Louisiana by reference to the income which the corporation has outside Louisiana or the amount of capital it has invested outside the State. That, however, is precisely what the chain store tax under consideration here undertakes to do.

Louisiana has also a general license tax to which the plaintiff and the intervenors in this case are also subject, which requires everyone selling merchandise at retail to pay a graduated license tax fixed by reference to gross sales; see Dart's Louisiana General Statutes, §8588 and following. The plaintiff and each of the intervenors is also subject to a corresponding municipal graduated license tax on gross retail sales in each municipality in which business is done; see Dart's Louisiana General Statutes, §8631.

The Invalidity of the Louisiana 1934 Statute Will Leave the 1932 Statute in Effect.

We have conceded that upon a decision holding in-

valid the 1934 statute, the tax provided for by the 1932 Louisiana statute will be effective. This is conceded in the original bill of complaint and in the intervening bills, wherein it is alleged that the plaintiff and intervenors have tendered to the State the taxes which would have been due under the 1932 statute and that such tender has been declined. Upon a decision that the 1934 statute is invalid, the State will receive all the chain store taxes to which it is legitimately entitled from the plaintiff and intervenors through the tax provided for in the 1932 tax, which, like every other chain store statute in existence in the United States, is based upon operations within the State.

The preceding discussion, is, we think adequate to indicate that a decision declaring the Louisiana 1934 statute invalid may be rested upon the commerce clause as well as upon the 14th Amendment of the Federal Constitution. The commerce clause has however particular application to operations of the Louisiana statute insofar as it affects the mail order business of Montgomery Ward & Company and Sears Roebuck & Company, and a short separate memorandum discussing this particular phase of the position of these companies will be filed in behalf of Montgomery Ward & Company.

Just as this brief is about to go to press, we have been given the opportunity to see a copy of the brief of appellees. We desire to make the following brief rejoinder.

(a) In point VI at page 98 of their brief, appellees contend "in the alternative" that the Louisiana statute may be supported as a classification of chain operating in Louisiana as local, sectional and national chains, referr-

ing to the language in the majority opinion and one of the dissenting opinions in *Liggett vs. Lee*, 288 U. S. 517. **The Louisiana statute does not make any such classification.** If a corporation or individual owns one store in Louisiana and another in New York, the Louisiana statute treats the situation precisely as if one of the stores were in Louisiana and the other in Mississippi. The Census Bureau classification referred to in the quoted language from the *Liggett* case was based on geographical classification. The Louisiana statute takes nothing into account but number of establishments, irrespective of geographical location. The Louisiana statute is directed solely against size outside the State, wherever the size may be.

(b) The appellees' argument in point VIII at page 101 with reference to the Robinson-Patman Act is beside the point. We are not contending that the passage of the Robinson-Patman Act changes the legal situation. We refer to that Act as illustrating and making vivid our contention that prohibition of size incident to operations outside the State may properly be accomplished only by national legislation. Our point is solely that Congress has the power to regulate matters beyond the jurisdiction of the states. It has in fact undertaken to exercise this power, but the validity of our argument would not be affected if it had not undertaken to do so, or if it has not yet exercised it to the fullest extent.

(c) In the list of corporations appearing at page 97 of appellees' brief, there appear Firestone Tire & Rubber Company, Goodyear Tire & Rubber Company and General Electric Company. These corporations are not parties to the present suit. Counsel have agreed that the State's claims against them shall be held in abeyance until the decision in this case is rendered. The record, as far as we are advised, contains no figures with respect to them. **No one**

would think of them as chain stores and they are not even classified as mercantile enterprises in the work cited by appellees. They sell only or chiefly their own products and their establishments in Louisiana are solely outlets for such products. It is indicative of the far-reaching character of the Louisiana statute that it would reach them upon a basis which would tax each of their Louisiana outlets at the rate of $500, or more, although no one of them has more than 6 outlets in Louisiana (Goodyear Tire & Rubber Company and General Electric Company having each only 3 such outlets). Their assets are chiefly invested in manufacturing plants and we believe that there is no basis for including the assets of these corporations in making a summary of resources of chain stores. The assets shown by them in appellees' table account for the bulk of the total there shown. The inclusion of these figures in the appellees' brief confirms our contention that the Louisiana statute is directed not against chain stores, but against size outside the state.

(d) In point VII, page 100 of their brief, appellees seek to avoid our contention that the principal of the Louisiana statute may be extended to income, franchise and other taxes on the ground that this court has already held that there is sufficient difference in the methods of operation used by chains to justify classification according to the number of stores, and that it is immaterial whether, as far as the present case is concerned, this same classification would be held valid for other types of business. But the decisions of this court heretofore rendered relate only to separate classification and taxation of chain stores according to their operations within the state. This Court has correspondingly maintained graduated net income taxes applying solely to income accruing within a

state. Compare *United States Glue Company vs. Oak Creek*, 247 U. S. 321. But the present case goes beyond the confines of the state, and the Louisiana statute cannot be supported upon the ground that it only classifies units within the state. If the Court should decide in the present case that the tax on chain stores, classified as such within the state, may be increased because of the existence of establishments outside the state, no argument has been suggested against the application of a corresponding doctrine in the case of income and franchise taxes on operations within a state. In reaching a conclusion as to the validity of the Louisiana statute, this Court is bound to consider the effect of the decision in this case upon the power of a state in other cases to increase taxes on what is within its borders by reference to what is outside.

(e) None of the cases cited in appellees' brief support the Louisiana statute.

Tax Commissioners vs. Jackson, 283 U. S. 527 (1931) sustained by a 5 to 4 decision the right of Indiana to impose a tax upon chain stores regulated solely by the number of units within the state without any attempt by the state to increase the rate by reference to the number of stores outside the state. *Fox vs. Standard Oil Company*, 294 U. S. 87 (1935) was also a 5 to 4 decision to the same effect. *Liggett vs. Lee*, 288 U. S. 517 (1933) invalidated a Florida chain store tax, although it was confined to the borders of the state, because it was based upon an arbitrary discrimination as to locations within counties. The dissenting opinion of Mr. Justice Brandeis urging the maintenance of the statute as a justifiable discrimination against size was directed only to size within the state and does not suggest that the state's power should be extended to prohibit size of operations outside the state. This dissent was not concurred in by any other member

of the court. That the majority of the court does not agree with the view that even within a state a discrimination may be established against a corporation solely because it is a corporation is shown by *Quaker City Cab Company vs. Pennsylvania*, 277 U. S. 389 (1928). The Louisiana statute moreover is not confined in operation to corporations.

In *Railway Express Company vs. Virginia*, 282 U. S. 440 (1931) cited at page 95 of the appellees' brief, the court was careful to say:

> "There is not here, as there was in Western Union Telegraph Company vs. Kansas, 216 U. S. 1 and Pullman Company vs. Kansas, 216 U. S. 56, a deliberate attempt to use the State's powers as the means for attaining the unconstitutional result of **taxing property outside the State.**"

Educational Films Company vs. Ward, 282 U. S. 379 (1931) cited at page 92 of the appellees' brief, involved the power of New York over a **domestic** corporation.

With respect to *Horn Silver Mining Company vs. New York*, 143 U. S. 305 (1892) cited at page 96 of the appellees' brief, it was said by this court in *Hanover Fire Insurance Company vs. Carr*, 272 U. S. 494, at page 507:

> "It was settled in * * * Horn Silver Mining Company vs. New York, 143 U. S. 305, that foreign corporations cannot do business in a state except by the consent of the state; that the state may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction. **But there is a very important qualification to this power of a state,** the recognition and enforcement of which is shown in a number of decisions in recent years. **That qualification is that the state may not exact as a condition of the corporation's engaging in business within its lim-**

> **its that its rights secured to it by the Constitution of the United States may be infringed. This is illustrated * * * * in cases in which the state has vainly attempted to subject foreign corporations to a payment of a tax which is a tax** not only upon the property of the corporation in the state but also **on its property without the state,** in violation of the due process clause of the Fourteenth Amendment. * * * * *"

See also *Quaker City Cab Company vs. Pennsylvania,* 277 U. S. 389 (1928); *Fidelity & Deposit Company of Maryland vs. Tafoya,* 270 U. S. 426 (1926) heretofore cited.

Other citations in appellees' brief are, we believe, sufficiently met by our principal discussion and further rejoinder appears unnecessary.

SUMMARY AND CONCLUSION

We respectfully submit that the preceding argument fully supports, and indeed requires, the following conclusions:

First: A State cannot tax operations beyond its borders

Second: A State cannot by language or indirection accomplish an unconstitutional purpose or use a so-called right as part of a scheme to accomplish a forbidden result. The practical result and effect of the statute, not its form, is controlling.

Third: The Louisiana statute of 1934 in design and effect taxes operations outside of Louisiana. A corporation is required to pay increased taxes to Louisiana solely by virtue of what it does outside of Louisiana. A corporation, firm or individual may actually decrease its

operations in Louisiana and yet be required to pay increased taxes to Louisiana because of what is done outside Louisiana.

Fourth: The Louisiana statute is especially arbitrary in taxing operations outside Louisiana irrespective of the remoteness of those operations, their character or connection with operations within Louisiana, and in proceeding upon the theory that mercantile establishments are fungible and that all stores everywhere are of the same character and value. The Louisiana statute cannot be supported upon any theory of allocation. It prescribes no formula calculated to restrict the burden of the Louisiana tax to values resulting from Louisiana operations and fairly ascribable to Louisiana. The Louisiana statute does not undertake any classification of chains into national, sectional and local; it gives no weight whatsoever to geographical location.

Fifth: Recognition of the right of Louisiana to tax operations outside its borders would give every State far reaching power to exclude foreign corporations and also individuals by erecting economic barriers along its borders.

Sixth: The Louisiana statute does not represent any policy to protect, and was not designed to, and does not in fact, protect independent merchants against chains, but establishes an arbitrary discrimination against chains operating in other States.

Seventh: Every legitimate claim of Louisiana against plaintiff and intervenors is satisfied by the Chain Store Act of 1932, the General License Tax Law, the Income Tax law and the Corporation Franchise Tax law. The Chain Store Act of 1934 presents an unconstitutional attempt to

obtain further revenues for the State by an extra-territorial tax on operations outside the State.

On these grounds we submit that the judgment below should be reversed and the Louisiana statute of 1934 should be declared invalid and its enforcement against complainant and intervenors permanently enjoined.

Respectfully submitted,

JOSEPH G. GAMBLE,
J. BLANC MONROE,
MONTE M. LEMANN,
Attorneys for Complainant and Intervenors.

APPENDIX

Federal Trade Commission Report on Gross Profit and Average Sales per Store of Retail Chains, Senate Document 178, 72nd Congress, 2d Session, Table 16, Page 33.

Table 16.—*Average sales per store and gross profits, by size of chain, 1909-1930*[1]

Number of stores per chain	Chain years[2]	Store years[3]	Average sales per store	Percentage of gross profit on sales
2-5	5,821	18,576	$231,732	31.8
6-10	1,788	13,754	144,941	30.0
11-25	1,183	19,016	102,498	31.1
26-50	550	20,040	87,273	29.4
51-100	359	25,365	72,817	28.3
101-500	370	77,260	90,295	28.1
501-1,000	63	41,713	69,818	27.0
1,001 and over	84	253,626	59,117	23.1
Total	10,218	469,711	78,256	26.7

[1]The period varies, however, for the different kinds of business included.

[2]Number of chains reporting in each year, added together.

[3]Average number of stores at the beginning and ending of each year, added together. Franctions of stores are disregarded in final figures shown in this column.

Federal Trade Commission Report on Sales, Costs and Profits of Retail Chains, Senate Document No. 40, 73rd Congress, 1st Session, Table 32 at pages 54 and 55:

Table 32.—*Percentages of net operating profit to sales, by kind and size of chain, all years combined*

Kind of chain	Number of stores per chain								Average
	2 to 5	6 to 10	11 to 25	26 to 50	51 to 100	101 to 500	501 to 1,000	1,001 and over	
Upward:									
Grocery	2.15	1.66	1.52	1.66	1.93	2.63	1.68	2.23	2.10
Gro. & meat	1.98	1.91	1.68	2.22	2.04	1.86	2.42	2.98	2.82
Var. ($1 limit)	2.81	3.20	6.17	6.58	4.49	8.60	9.75	10.47	9.16
D. G. & apparel	3.41	4.34	3.64	-.14	4.52	8.56	7.43	5.72	5.93
Confectionery	2.53	6.57	8.48	7.95	-1.44	11.21	-----	-----	6.04
W. shoes	.97	1.24	4.08	2.42	6.77	7.59	-----	-----	3.45
M. & W. r'dy-to-wear	6.62	8.00	13.85	7.58	17.06	-----	-----	-----	8.84
Mus. inst'm'ts	1.22	-7.18	1.21	2.70	-----	-----	-----	-----	1.58
Gen'l mdse	3.20	3.30	4.66	-----	-----	-----	-----	-----	3.66
Downward:									
Dept. store	5.34	4.29	2.64	2.11	-----	6.14	-.96	-----	4.45
Var. ($5 limit)	2.59	4.37	2.35	4.12	-.23	-----	-----	-----	2.88
Var. (unlimited)	3.18	3.29	2.68	-4.78	-----	-----	-----	-----	.23
M. r'dy-to-wear	4.55	1.13	.90	1.06	-----	-----	-----	-----	2.39
Hats & caps	2.54	-----	-.65	-2.49	1.13	-----	-----	-----	-.42
Dry goods	2.43	.75	2.41	-7.43	-----	-----	-----	-----	1.15
Furniture	10.15	13.85	13.74	6.92	-----	-----	-----	-----	11.46
Indeterminate:									
Drug	2.91	4.03	4.41	4.13	4.38	4.92	2.49	-----	4.21
Tobacco	1.37	.25	.30	1.34	-.32	3.79	-----	2.60	2.68
Meat	2.27	1.16	2.29	3.37	2.53	-1.04	-----	-----	2.45
W. r'dy-to-wear	2.53	5.71	3.12	5.56	4.97	4.37	-----	-----	4.35
Millinery	2.84	2.00	2.44	1.51	1.97	2.90	-----	-----	2.36
M. & W. shoes	4.95	1.63	2.55	2.86	.94	4.19	-----	-----	3.17
M. shoes	2.17	8.63	5.26	4.89	2.78	-----	-----	-----	4.64
Hardware	3.40	4.12	1.53	1.78	7.78	-----	-----	-----	3.24
M. furnishings	1.13	3.25	-.55	1.43	-----	-----	-----	-----	.75
W. accessories	3.97	2.81	1.63	4.91	-----	-----	-----	-----	2.69
Average	4.86	4.26	3.67	3.53	3.06	5.65	4.39	4.23	4.45

APPENDIX

Louisiana Chain Store Tax Statute of 1934
Act 51 of the Louisiana Legislature of 1934, p. 251

ACT NO. 51

House Bill No. 526. By Messrs. Burns and Duke.

AN ACT

To amend and re-enact the Title and Sections 1, 3, 5, 6, and 7 of Act 19 of 1932, entitled: "An Act to levy an annual license tax on all persons, firms, partnerships, corporations or associations of persons engaged in the business of operating or maintaining two or more stores or mercantile establishments in this State where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail under the same general management, supervision, ownership or control, commonly known as branch or chain stores, under Section 8 of Article X of the Constitution of 1921; and providing penalties for the violation of this Act; and making an appropriation and distribution of said funds."

Section 1. Be it enacted by the Legislature of Louisiana, That the title of Act 19 of 1932 be amended and re-enacted so as to read as follows:

An Act to levy an annual license tax on all persons, firms, partnerships, corporations or associations of persons engaged in the business of operating two or more stores or mercantile establishments, one or more of which is located in this State, where goods, wares, merchandise, or commodities of every description whatsoever are sold or offered for sale at retail under the same general management, supervision, ownership or con-

trol, commonly known as branch or chain stores, under Section 8 of Article X of the Constitution of 1921; and providing penalties for the violation of this Act; and making an appropriation and distribution of said funds.

Section 2. That Section 1 of Act 19 of 1932 be amended and re-enacted so as to read as follows:

Section 1. Be it enacted by the Legislature of Louisiana, That because of the advantages accruing from the operation of multiple stores wherever situated, and because of the basic difference inherent in such character of operations, there be and is hereby levied an annual license tax for the year 1935 and for each subsequent year upon each person, firm, partnership, corporation or association of persons engaged in the business of operating, or maintaining, as part of a group or chain, any store or stores in this State, where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail under the same general management, supervision, ownership or control, commonly known as branch or chain stores.

Section 3. That Section 3 of Act 19 of 1932 be amended and re-enacted as to read as follows:

Section 3. That the license tax for said business described in this Act levied upon the store or stores operated in the State of Louisiana shall be based on the number of stores or mercantile establishments included under the same general management, supervision, ownership or control, whether operated in this State or not, and shall be fixed and graded as follows, to-wit:

(1) Upon stores or mercantile establishments operated in this State and belonging to a chain or

group having a total of not more than ten stores, the annual license shall be Ten ($10.00) Dollars for each such store operated in this State.

(2) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than ten stores, but not more than thirty-five stores, the annual license shall be Fifteen ($15.00) Dollars for each such store operated in this State.

(3) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than thirty-five but not more than fifty stores, the annual license shall be Twenty ($20.00) Dollars for each such store operated in this State.

(4) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than fifty stores but not more than seventy-five stores, the annual license shall be Twenty-five ($25.00) Dollars for each such store operated in this State.

(5) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than seventy-five stores but not more than one hundred stores, the annual license shall be Thirty ($30.00) Dollars for each such store operated in this State.

(6) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than one hundred stores but not more than one hundred twenty-five stores, the annual license shall be Fifty ($50.00) Dollars for each such store operate in this State.

(7) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than one hundred twenty-five stores but not more than one hundred fifty stores, the annual license shall be One Hun-

dred ($100.00) Dollars for each such store operated in this State.

(8) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than one hundred fifty stores but not more than one hundred seventy-five stores, the annual license shall be One Hundred Fifty ($150.00) Dollars for each such store operated in this State.

(9) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than one hundred seventy-five stores but not more than two hundred stores, the annual license shall be Two Hundred ($200.00) Dollars for each such store operated in this State.

(10) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than two hundred stores but not more than two hundred twenty-five stores, the annual license shall be Two Hundred Fifty ($250.00) Dollars for each such store operated in this State.

(11) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than two hundred twenty-five stores but not more than two hundred fifty stores, the annual license shall be Three Hundred ($300.00) Dollars for each such store operated in this State.

(12) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than two hundred fifty stores but not more than two hundred seventy-five stores, the annual license shall be Three Hundred Fifty ($350.00) Dollars for each such store operated in this State.

(13) Upon stores or mercantile establishments

operated in this State and belonging to a chain or group having a total of more than two hundred seventy-five stores but not more than three hundred stores, the annual license shall be Four Hundred ($400.00) Dollars for each such store operated in this State.

(14) Upon stores or mercantile establishments operated in the State and belonging to a chain or group having a total of more than three hundred stores but not more than four hundred stores the annual license shall be Four Hundred Fifty ($450.-00) Dollars for each such store operated in this State.

(15) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than four hundred stores but not more than five hundred stores, the annual license shall be Five Hundred ($500.00 Dollars for each such store operated in this State.

(16) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than five hundred stores, the annual license shall be Five Hundred Fifty ($550.00) Dollars for each such store operated in this State.

Section 4. That Section 5 of Act 19 of 1932 be amended and re-enacted so as to read as follows:

Section 5. That the license taxes under this Act shall be payable before the first day of March of each year to the Supervisor of Public Accounts for the State of Louisiana, who is hereby charged with the duty of collecting the said taxes, and if delinquent, such taxes shall bear interest at the rate of two per cent per month, plus ten per cent additional on both principal and interest as attorney's fees in

all cases wherein an attorney is called on to assist in the collection.

A separate license shall be issued for each store operated or maintained by licensee, and it shall be the duty of licensee to post the license in a conspicuous place in each store.

That the Supervisor of Public Accounts, in order to enforce the collection of the aforesaid taxes is hereby authorized to employ private counsel to represent him in any proceeding under this Act.

Section 5. That Section 6 of Act 19 of 1932 be amended and re-enacted so as to read as follows:

Section 6. All taxes collected under the provisions of this Act shall be paid to the Supervisor of Public Accounts, and he shall distribute and apportion and pay such amounts so received by him in any fiscal year to the various parishes of the State of Louisiana wherein said stores are located, based pro rata upon the population of each parish as found and shown by the last United States census of the said State of Louisiana, and the said Parishes shall use the apportioned fund as follows, to-wit: first, for the liquidation of any outstanding road or school bonds, or other bonded indebtedness of said parish, which bonded indebtedness is paid by a tax levied on property; second, where there is no bonded indebtedness, as above stated, the aforesaid pro rated funds shall be applied to and used for the public schools of said parishes; provided, however, in the Parish of Orleans the same shall go to the General Fund.

Section 6. That Section 7 of Act 19 of 1932 be amended and re-enacted so as to read as follows:

Section 7. That the manner of collecting licenses under this Act and the enforcement thereof, the form of license receipt, and the manner of recording and filing affidavits shall be similar to that now provided, or may hereafter be provided, for the collection by the Tax Collector of other license taxes.

Section 7. That all laws or parts of laws in conflict herewith be, and the same are, hereby repealed.
Approved by the Governor: July 12, 1934.
A true copy:

E. A. CONWAY,
Secretary of State.

Louisiana Chain Store Tax Statute of 1932

Act 19 of the Louisiana Legislature of 1932, p. 125

ACT No. 19

House Bill No. 137. By Messrs. Wimberly, Madison, Bradford and Calhoun.

AN ACT

To levy an annual license tax on all persons, firms, partnerships, corporations or associations of persons engaged in the business of operating or maintaining two or more stores or mercantile establishments in this State where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail under the same general management, supervision, ownership or control, commonly known as branch or chain stores, under Section 8 of Article X of the Constitution of 1921; and providing penalties for the violation of this Act; and

making an appropriation and distribution of said funds.

Section 1. Be it enacted by the Legislature of Louisiana, That there be and is hereby levied an annual license tax for the year 1933, and for each subsequent year, upon each person, firm, partnership, corporation or association of persons engaged in the business of operating or maintaining two or more stores or mercantile establishments in this State where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail under the same general management, supervision, ownership or control, commonly known as branch or chain stores.

Section 2. That every person, firm, partnership, corporation or association of persons engaged in the business described in Section 1 of this Act and doing business in this State shall, on or before the first day of February of each year, render to the Supervisor of Public Accounts a report signed and sworn to by the person or persons in interest, his or their duly authorized agent or officer, containing a true and complete statement showing the number of stores or mercantile establishments operated or maintained in this State in the preceding year; the name, location and street address of each such store or mercantile establishment; and such other information as the said Supervisor of Public Accounts may require.

Section 3. That the license tax on such business described in Section 1 of this Act shall be based on the number of stores or mercantile establishments in this State, and shall be fixed and graded as follows, to-wit:

(1) Upon two stores or more, but not to exceed five stores, the annual license shall be Fifteen Dollars for each store;

(2) Upon each store in excess of five, but not

to exceed ten, the annual license shall be Twenty-five Dollars for each such additional store;

(3) Upon each store in excess of ten, but not to exceed fifteen, the annual license shall be Thirty Dollars for each such additional store;

(4) Upon each store in excess of fifteen, but not to exceed twenty, the annual license shall be Forty Dollars for each such additional store;

(5) Upon each store in excess of twenty, but not to exceed twenty-five, the annual license shall be Fifty Dollars for each such additional store;

(6) Upon each store in excess of twenty-five, but not to exceed thirty, the annual license shall be Sixty Dollars for each such additional store;

(7) Upon each store in excess of thirty, but not to exceed thirty-five, the annual license shall be Seventy Dollars for each such additional store;

(8) Upon each store in excess of thirty-five, but not to exceed forty, the annual license shall be Eighty Dollars for each such additional store;

(9) Upon each store in excess of forty, but not to exceed forty-five, the annual license shall be Ninety Dollars for each such additional store;

(10) Upon each store in excess of forty-five but not to exceed fifty, the annual license shall be One Hundred Dollars for each such additional store;

(11) Upon each store in excess of fifty, the annual license shall be Two Hundred Dollars for each such additional store.

Section 4. The license herein prescribed shall be in addition to *ad valorem* taxes and licenses prescribed in the general license laws of this State.

Section 5. That the license taxes under this Act

shall be payable before the first day of March of each year to the State Tax Collector for the parish in which is located the domicile or principal place of business of licensee of this State, and if delinquent, shall bear interest at the rate of two per cent per month, plus ten per cent additional on both principal and interest as attorney's fees to be paid the attorney for the tax collector in charge of license matters. A separate license shall be issued for each store operated or maintained by licensee, and it shall be the duty of licensee to post a license in a conspicuous place in each store.

Section 6. All taxes collected under the provisions of this Act shall be paid to the Supervisor of Public Accounts, and he shall distribute and apportion and pay such amounts so received by him in any fiscal year to the various parishes of the State of Louisiana wherein said tax is collected, based pro rata upon the population of each parish as found and shown by the last United States census of the said State of Louisiana, and the said parishes shall use the apportioned fund as follows, to-wit: first, for the liquidation of any outstanding road or school bonds, or other bonded indebtedness of said parish, which bonded indebtedness is paid by a tax levied on property; second, where there is no bonded indebtedness, as above stated, the aforesaid pro rated funds shall be applied to and used for the public schools of said parishes; provided, however, in the Parish of Orleans the same shall go to the General Fund.

Section 7. That the time and manner of collecting licenses under this Act and the enforcement thereof, the form of license receipt, the manner of recording and filing affidavits by the tax collector and rendering accounts to the Auditor, shall be the same as now provided, or may hereafter be provided, for the collection of other license taxes.

Section 8. Any person, the member of any firm, the officer or manager of any corporation, violating any of the provisions of this Act, shall be guilty of a misdemeanor, and upon conviction in a court of competent jurisdiction, shall be punished by a fine of not more than Five Hundred Dollars nor less than Fifty Dollars, or by imprisonment of not more than ninety days nor less than sixty days in the parish jail, or both such fine and imprisonment, at the discretion of the court.

Section 9. The provisions of this Act shall not apply to any person, firm, partnership, corporation, or association of persons, selling or distributing any commodity under a public utility franchise from the State of Louisiana or any parish, municipality or other political subdivision thereof, and selling only such goods, wares and merchandise, as may be used with the commodity distributed under such franchise.

Section 10. That the provisions of this Act shall not apply to gasoline filling stations where the average daily stock of gasoline, motor oils or automobile accessories carried does not exceed Fifteen Hundred ($1,500.00) Dollars.

Section 11. That in the event any phrase, clause, or section of this Act is found to be unconstitutional for any reason, such unconstitutionality shall not have the effect of invalidating those other portions of this Act which may be found to be constitutional, but those other portions which are found to be constitutional shall continue to remain in full force and effect.

Section 12. That all laws or parts of laws in conflict herewith be and the same are hereby repealed.

Approved by the Governor. July 7, 1932.

A true copy:

E. A. CONWAY,

Secretary of State.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1936

No. 652

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, ET AL.,
Appellants,

v.

ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS, STATE OF LOUISIANA, ET AL.,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

SUPPLEMENTAL BRIEF FOR APPELLANT MONTGOMERY WARD & CO., INCORPORATED,

ROBERT L. WRIGHT,
Attorney for Appellant,
Montgomery Ward & Co., Incorporated.

MONROE & LEMANN,
of Counsel.

HAUSER PRINTING CO., NEW ORLEANS

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Supreme Court of the United States

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Appellees.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

SUPPLEMENTAL BRIEF FOR APPELLANT MONTGOMERY WARD & CO., INCORPORATED,

---

STATEMENT OF THE CASE

The purpose of this brief is to discuss the effect of the Louisiana Chain Store Act upon a chain store operator which is extensively engaged in the conduct of interstate sales operations through mail order houses, order-taking units, and retail stores. The effect of the tax in question on these interstate operations is the basis on which this appellant has invoked the protection of the Commerce Clause of the United States Constitution in arguing that the tax is invalid. The facts regarding these

operations are set forth in the intervening petition of Montgomery Ward & Co., (R. 25-31) hereinafter referred to as Ward, and in the affidavits by J. A. Donaldson and C. B. Fullerton, filed in support thereof. R. 136-143. Inasmuch as the case has been submitted, by stipulation, upon affidavits and counter-affidavits, and the counter-affidavits of the defendants have not contradicted any of the facts in Ward's affidavits, the facts in Ward's affidavits may be regarded as admitted. R. 81.

In addition to the contentions made on behalf of all appellants in the principal brief, this appellant contends that the tax is invalid, as applied to it and the other mail order chain intervening herein, Sears, Roebuck & Co., because (1) it levies a flat tax for the privilege of operating stores partially engaged in interstate commerce and (2) the amount of the tax is fixed by the number of stores or mercantile establishments operated everywhere, some of which are exclusively engaged in interstate commerce.

Section Two of Act 51 (amending Section One of the prior act) levies an annual license tax on all persons "engaged in the business of operating, or maintaining, as part of a group or chain, any store or stores in this State, where goods, wares, merchandise, or commodities of every description whatsoever are sold or **offered for sale** at retail under the same general management, supervision, ownership or control, commonly known as branch or chain stores." R. 257 (emphasis ours). The amount of the tax "shall be based on the number of stores **or mercantile establishments** included under the same general management, supervision, ownership, or control, whether operated in this State or not * * *" Section Three, R. 257, (emphasis ours). The foregoing record references refer to the quotations from the statute

found in the opinion. The full text does not appear in the record but is printed as an appendix to the appellants' main brief.

As of January 31, 1935, Ward operated 17 large department stores, 456 retail stores of limited size carrying a limited line of merchandise, and 16 small stores devoted exclusively to the sale of hardware, household appliances, automobile tires and tubes. R. 137. Five of the retail stores of limited size, designated as Class "B" stores, were operated in the State of Louisiana, and are the stores to which the tax herein contested is sought to be applied. R. 138. In addition to the retail store business carried on in the aforesaid chain of stores, Ward operated 9 mail order establishments engaged in warehousing, selling and shipping a complete line of merchandise to all parts of the United States and foreign countries on orders received by mail, which were respectively located at Albany, New York; Baltimore, Maryland; Chicago, Illinois; Denver, Colorado; Fort Worth, Texas; Kansas City, Missouri; Oakland, California; Portland, Oregon; and St. Paul, Minnesota. R. 138. As an additional part of this mail order business, 19 order offices were maintained in the States of Florida, Georgia, Minnesota, New York, and Wisconsin, which consisted merely of rooms or offices where catalogs and samples were displayed, but no stocks were carried. R. 138. Sales in these units were made by means of the regular catalog orders used by individual customers, which were forwarded by the order-taking units to the various mail order establishments for acceptance and direct shipment of the merchandise to the customer. R. 138. The five Louisiana stores were also operated as order-taking units for the mail order establishment operated at Fort Worth, Texas, in addition to carrying a regular stock of merchandise which was sold over the counter. R. 139. Catalogs were displayed at these

stores and customers were able to purchase merchandise by filling out a catalog order at the store, which was in turn transferred by the store to the Fort Worth mail order house and the merchandise was shipped direct to the customer as in any mail order transaction. R. 139.

In addition to the catalog order business, the Louisiana stores also made interstate sales for their own account of merchandise not stocked by them, which they ordered direct from the factory or mail order warehouse where it was stocked, and which the factory or mail order warehouse shipped direct to the customer. Inasmuch as Ward deals with no factories in Louisiana, all of said shipments were necessarily interstate shipments. R. 139. The volume of these interstate shipments of store orders was 4% of the total sales volume of the stores, and the volume of the catalog mail orders handled by the store was an additional 5% of the total volume of sales. R. 139. About 67% of all the sales made by the nine mail order establishments required interstate shipments of merchandise, and 100% of the sales made by the order taking units located in states where Ward did not maintain a mail order house required an interstate shipment of the merchandise. R. 140.

The court below attempted to dispose of our contention by stating that the statute directly applies only "where goods, wares, merchandise, or commodities of every description whatsoever are sold or offered for sale at retail." R. 263. As there was no further discussion of the point, the lower court impliedly held that the quoted language was sufficient to limit the scope of the Act to intrastate operations. We therefore propose to show in the ensuing argument that the statute does, insofar as the mail order chains are concerned, directly apply to inter-

state mercantile business and lays a direct burden upon the interstate commerce carried on by this appellant.

The assigned error intended to be urged is number (12), which is as follows:

> "The court erred in failing to hold that the Louisiana statute places a direct burden upon interstate commerce operations in the mail order business of intervenors Montgomery Ward & Co. and Sears, Roebuck & Company." R. 277.

SUMMARY OF ARGUMENT

I.

WARD'S LOUISIANA STORES, ITS MAIL ORDER HOUSES AND ORDER OFFICES ARE ALL STORES OR MERCANTILE ESTABLISHMENTS WITHIN THE MEANING OF THE LOUISIANA CHAIN STORE ACT.

Act 51 of the Louisiana Legislature of 1934, Sections 2 and 3;

Webster's New International Dictionary.

II.

WARD'S RETAIL STORES, MAIL ORDER HOUSES, AND ORDER OFFICES ARE ALL PARTIALLY OR WHOLLY ENGAGED IN INTERSTATE COMMERCE.

Federal Trade Commission v. Pacific States Paper Trade Association, 273 U. S. 52;

Montgomery Ward & Co., Inc., v. Fry, et al., 277 Michigan 250, 269 N. W. 166;

Robbins v. Taxing District of Shelby County, 120 U. S. 489.

III.

THE TAX IS INVALID BECAUSE IT IS LEVIED FOR THE PRIVILEGE OF OPERATING STORES CON-

DUCTING BOTH INTRASTATE AND INTERSTATE BUSINESS AND THE TAX IS NOT DIVISIBLE IN ACCORDANCE WITH THE RESPECTIVE AMOUNTS OF INTRASTATE AND INTERSTATE BUSINESS TRANSACTED.

Bowman v. Continental Oil Co., 256 U. S. 642;

Cooney v. Mountain States Tel. & Tel. Co., 294 U. S. 384.

IV.

THE TAX IS INVALID BECAUSE IT DIRECTLY APPLIES TO LOUISIANA UNITS WHOLLY ENGAGED IN INTERSTATE COMMERCE AND IS PARTLY MEASURED BY INTERSTATE OPERATIONS CARRIED ON WHOLLY OUTSIDE THE STATE OF LOUISIANA.

Fisher's Blend Station, Inc. v. Tax Commissioner, 297 U. S. 650;

Montgomery Ward & Co., Inc. v. Fry, et al., 277 Michigan 250, 269 N. W. 166;

Rearick v. Pennsylvania, 203 U. S. 507.

ARGUMENT

I.

WARD'S LOUISIANA STORES, ITS MAIL ORDER HOUSES AND ORDER OFFICES ARE ALL STORES OR MERCANTILE ESTABLISHMENTS WITHIN THE MEANING OF THE LOUISIANA CHAIN STORE ACT.

The word "mercantile" is defined by Webster's New International Dictionary as "Of or pertaining to merchants, or the business of merchants, characteristic of, or befitting a merchant, having to do with, or engaged in, trade, or the buying and selling of commodities; com-

mercial." The word "establishment" is defined by the same source as "The place where one is permanently fixed for residence or business * * * also, any office or place of business, with its fixtures." The word "store", Webster defines as "Any place where goods are kept for sale, whether by wholesale or retail; a shop." We think it is apparent without further burdening the court with dictionary definitions, that the phrase "stores or mercantile establishments" in Section Three of the Act was obviously used by the Louisiana Legislature to reach not merely business establishments selling at retail from a local stock of goods, but retail businesses of every description. The words quoted by the court below, "where goods, wares, merchandise, or commodities of every description whatsoever are sold or offered for sale at retail", (R. 263) which qualify the words" store or stores" in Section Two, do not restrict the tax to places selling at retail from a local stock, the words "or offered for sale" being apparently expressly intended to include stores where merchandise is not stocked or sales consummated but which act merely as retail sales agencies.

Ward's five Louisiana stores do a retail business from their local stocks and also offer mail order merchandise for sale as agents for the Fort Worth mail order house. R. 139. Ward's order offices all offer merchandise for sale by displaying catalogs and samples. R. 138. The nine mail order houses conduct mainly an interstate retail business, and the order offices in states where no mail order house is located do an exclusively interstate business. R. 140. Yet, it is clear that every one of these business units is a "store" where merchandise is "offered for sale" or a "mercantile establishment" as those terms are used in the Act. Were it not for the implication arising from the opinion below, that the language of the Act

excluded interstate business from its operation, we should not have thought this point required discussion.

II.

WARD'S RETAIL STORES, MAIL ORDER HOUSES, AND ORDER OFFICES ARE ALL PARTIALLY OR WHOLLY ENGAGED IN INTERSTATE COMMERCE.

In our statement of the case, we pointed out that 9% of the sales made by the Louisiana stores were sales in which orders were taken for merchandise to be shipped direct to the customer from outside the state, that 67% of the orders sent to Ward's mail order houses required interstate shipments of merchandise and that 100% of orders sent to Ward's order offices located in states where there was no mail order house required the interstate shipment of merchandise. R. 139-140. All of these units were, to a greater or lesser extent, engaged in interstate commerce as that term has been defined by the decisions of this court. In *Federal Trade Commission v. Pacific States Paper Trade Associations*, 273 U. S. 52, 64, the court said of interstate commerce, "such commerce is not confined to transportation, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one state to another." In *Robbins v. Taxing District of Shelby County*, 120 U. S. 489, 492, the court said, "The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce."

We think it is clear from these definitions that the sales made by the Ward stores, mail order houses, and order offices which required the interstate shipment of merchandise, were sales made in interstate commerce,

and the Supreme Court of Michigan has so held in *Montgomery Ward & Co., Inc. v. Fry, et al.*, 277 Michigan 250, decided October 5, 1936. This case involved the application of the Michigan Sales Tax Act to Ward stores in Michigan, which solicited orders for the Chicago mail order house and offered catalog merchandise for sale in the same way that the Louisiana stores solicit orders for the Fort Worth mail order house. The Michigan tax was levied for the privilege of making retail sales and was measured by the gross proceeds thereof less certain statutory deductions. The State Board of Tax Administration attempted to include in the measure of the tax, orders taken by the Michigan retail stores as agents for the Chicago mail order house and sales made by the stores which required the shipment of the goods sold from outside the state. The court held that Ward's tax could not be measured by such sales, on the ground that these transactions were interstate commerce. We know of no decisions holding otherwise.

III.

THE TAX IS INVALID BECAUSE IT IS LEVIED FOR THE PRIVILEGE OF OPERATING STORES CONDUCTING BOTH INTRASTATE AND INTERSTATE BUSINESS AND THE TAX IS NOT DIVISIBLE IN ACCORDANCE WITH THE RESPECTIVE AMOUNTS OF INTRASTATE AND INTERSTATE BUSINESS TRANSACTED.

The general rule governing state occupational taxes was recently stated in *Cooney v. Mountain States Tel. & Tel. Company*, 294 U. S. 384, at pages 392-393 as follows:

> "There is no question that the state may require payment of an occupation tax from one engaged in both intrastate and interstate com-

> merce. But a state cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of a business is intrastate and therefore taxable, does not justify a tax either upon the interstate business or upon the whole business without discrimination. * * * Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business."

If the Louisiana tax were levied solely for the privilege of making intrastate sales, the fact that the taxed establishments were also engaged in making interstate sales would be of no importance. This intervenor now pays to the municipalities in which its Louisiana stores are located license taxes for the privilege of transacting local business. R. 26.

However, the chain store tax is not measured by the volume of intrastate business transacted, but is a flat sum payment for each sales unit operating within the state, without regard to whether the unit is engaged in intrastate or interstate selling. It is, in its effect on interstate commerce, a tax similar to the New Mexico license tax considered by this court in *Bowman v. Continental Oil Company*, 256 U. S. 642. The court found in that case that 94.5% of the oil company's business consisted of intrastate sales, but the remaining 5.5% of the sales required direct original package shipments from outside the state, which sales were interstate commerce. The court held that the $50.00 annual license

tax imposed by the State of New Mexico on "each distributing station or place of business' (p. 643) for the privilege of selling gasoline was invalid in its entirety because it was not divisible in accordance with the respective proportions of interstate and intrastate business conducted by the oil company's stations. We do not believe that the Louisiana license tax here in question is distinguishable in its effect upon interstate business from the New Mexico license tax there considered. The proportion of the interstate sales handled by the New Mexico stations, (5.5%) although less than the proportion of interstate sales handled by Ward's Louisiana stores, (9%) was sufficient to invalidate the New Mexico tax as to those stations. We respectfully submit that the Louisiana tax is equally invalid as to the Louisiana stores of this intervenor.

IV.

THE TAX IS INVALID BECAUSE IT DIRECTLY APPLIES TO LOUISIANA UNITS WHOLLY ENGAGED IN INTERSTATE COMMERCE AND IS PARTLY MEASURED BY INTERSTATE OPERATIONS CARRIED ON WHOLLY OUTSIDE THE STATE OF LOUISIANA.

Paragraph (16) of Section Three of the Act provides for a tax of $550.00 "upon stores or mercantile establishments operated in this state" belonging to a chain of more than five hundred stores. Ward would thus be compelled to pay a license tax for each separate order office that it might establish in the State of Louisiana. Inasmuch as Ward has no mail order house in Louisiana, (R. 138) any order office established there would be engaged in making interstate sales only. Such units would be exclusively engaged in interstate commerce and therefore not subject to state retail license taxation. *Rearick v.*

Pennsylvania, 203 U. S. 507; *Montgomery Ward & Co., Inc. v. Fry, et al.*, 277 Michigan 250. Yet, the Louisiana Act has imposed a license tax which in effect, prohibits the establishment of such units in the state.

Moreover, the State of Louisiana has not merely undertaken to levy direct and indivisible taxes upon units operated in the state regardless of whether or not they are engaged in interstate commerce, but has measured this tax according to the total number of stores or mercantile establishments owned or controlled by the tax payer regardless of their character or location. The effect of including ordinary stores operated outside the state in the computation by which the tax is measured has been argued in the appellants' main brief. We only wish to point out here the effect of including stores and mercantile establishments which are mainly or wholly engaged in interstate commerce. When the mail-order-taking units are included in the computation, the result is that the tax is being partly measured by the operation of a purely interstate business which may not be used as a measure for license taxation by any state. *Fisher's Blend Station, Inc. v. Tax Commissioner*, 297 U. S. 650; *Montgomery Ward & Co., Inc. v. Fry, et al.*, 277 Michigan 250.

Ward's 9 mail order houses and 19 order offices, (R. 138) when added to its 489 retail stores (R. 137) for classification purposes, as the Act requires, increase the tax paid by Ward's five Louisiana locations to $550.00 each, instead of $500.00. R. 259. The total tax would thus be increased by $250.00 by virtue of Ward's mail order operations, and the $250.00 levy thus computed is clearly a direct burden on those operations. While the total tax is nominally levied against the Louisiana locations, the payment is made, not out of profits derived from oper-

ating those stores, as they all show a loss, (R., 138-139) but from the other operations of the corporation, including its interstate mail order business.

CONCLUSION

In conclusion, we should like to point out that the interstate mail order business of this intervenor has subjected it to stringent Federal regulation, (R. 140-143) and the exemption from state regulation claimed in this case under the commerce clause is co-extensive with the Federal power to regulate the exempted activities. We respectfully submit that the Louisiana Chain Store Act taxes and thereby regulates the purely interstate operations of this appellant and Sears, Roebuck & Co., in direct violation of the exclusive power granted to the Federal Government under the Commerce Clause of the United States Constitution, and should be held invalid as to them upon that ground, in addition to the grounds specified in the appellants' principal brief.

Respectfully submitted,
ROBERT L. WRIGHT,
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Montgomery Ward & Co., Incorporated.

MONROE & LEMANN,
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FILED
MAR 23 193
CHARLES ELMORE C
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Supreme Court of the United States

OCTOBER TERM, 1936

No. 652

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, *et al.*,

Appellants,

versus

ALICE LEE GROSJEAN, Supervisor of Public Accounts, State of Louisiana, *et al.*,

Appellees.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

ORIGINAL BRIEF ON BEHALF OF APPELLEES.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, *et al.*,
Appellants,

versus

ALICE LEE GROSJEAN, Supervisor of Public Accounts, State of Louisiana, *et al.*,
Appellees.

No. 652

ORIGINAL BRIEF ON BEHALF OF APPELLEES.

OPINION BELOW.

The opinion rendered by a statutory court of three judges is reported in 16 F. Supp. 499. (Copy of opinion contained in addenda to this brief, *p. ix*).

STATEMENT OF THE CASE.

Appellants, The Great Atlantic & Pacific Tea Company, Sears, Roebuck & Company, Wohl Shoe Company, Consolidated Millinery Company, W. T. Grant Company, Scott-Burr Stores, J. C. Penney Company, F. W. Woolworth Company, J. J. Newberry Company, H. L. Green Company, Liggett Drug Company, Incorporated, Montgomery Ward & Company, G. R. Kinney Company, Incorporated, Fire-

stone Tire & Rubber Company, Goodyear Tire & Rubber Company, Melville Shoe Corporation and General Electric Company, all foreign corporations operating retail units or stores in Louisiana, attack, in this suit, the validity of Act 51 of the Louisiana Legislature of 1934, a copy of which Act appears in the addenda to this brief, *p. i.*

The Statute attacked was enacted by the Louisiana Legislature pursuant to the provisions of Section 10, Article 8 of the Constitution of Louisiana for the year 1921, authorizing the Legislature of Louisiana to levy excise, license or privilege taxes. (Pertinent part Section 10, Article 8, Constitution of Louisiana, p. 48, this brief).

The Act involved levies a license tax for the year 1935, and for each subsequent year, upon each person, firm, partnership, corporation or association of persons engaged in the business of operating or maintaining, a store or stores in Louisiana, where such store or stores are part of a chain or system under the same general management, supervision, ownership or control, and where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail. *Section 1 of Act 51 of 1934.*

Act 51 of 1934 classifies the business of operating chain stores in Louisiana according to the type of business done, and according to the value of the privilege of operating stores in Louisiana in multiple form.

The principal attack made on the constitutionality of said statute by appellants is that the statute violates the equal protection and the due process clauses of the Consti-

tution of the United States, and similar provisions in the Constitution of Louisiana, for the reason that, as alleged by appellants, the statute, in effect, taxes property outside the borders of the State of Louisiana and unjustly discriminates against them.

Summary of Appellees' Testimony.

Respondents offered the testimony of the following witnesses: A. D. Turner, W. C. Sugg, A. A. Allen, E. M. Steen, Joe Isaacman, Clark Faulk, J. W. Baker, J. S. Trisconi, J. W. Elston, W. C. Marshall, J. H. Brown, C. B. Ellis, B. Morgan, W. E. Penick, Lorris M. Wimberly, James T. Burns, and James D. Huck, Jr. (R. pp. 190-252).

For the convenience of the Court, the most important parts of the testimony of appellees' witnesses follow:

A. D. Turner (R. p. 196).

I am a resident of the City of Minden, Webster Parish, Louisiana; for twenty years served as President of the Bank of Webster, Minden, Louisiana, and President of Minden Building & Loan Association; served as Mayor of Minden and as President of Webster Parish School Board.

For more than 25 years, I have conducted, in said city, a retail business, selling general merchandise, groceries and meats; during 1925 to 1926, my business was one of the largest, outside of Monroe and Shreveport, in North Louisiana.

I have promoted and encouraged civic development; have paid my share of taxes to pay for schools, streets, court

house, and other public improvements. Chain operators, since 1926, have evidently believed Minden a fertile field to exploit, as there has been a steady influx of retail chain units, handling practically all lines of merchandise.

I know that the purchasing power behind each retail unit operated by chains, created by the combined purchasing power of all units, enables chains to purchase merchandise cheaper and undersell independent merchants who do not possess that tremendous purchasing power. The natural result is that competitors of chains who do not enjoy this large purchasing power and other advantages are unable to meet prices of chain retail units for the reason they operate one unit or a smaller number of units than the larger chains, and they are unable to compete with that purchasing power created by the fact that their competitors, operating larger chains, purchase for all units in huge volume; I am unable to purchase from manufacturers due to my limited purchasing power. I am compelled to purchase practically all of my merchandise from wholesalers. Due to my inability to meet chain retail prices, my business has fallen off to where I am operating at a loss.

I have endeavored to purchase as cheaply as possible, in order to compete with retail chain units, but I have found it impossible to meet the competition of chain units for the reason I operate only one unit, and do not have the volume of business required to purchase in the quantities purchased by my chain competitors; that I do not enjoy the bargaining power, and I am not in a position to demand and receive discounts, concessions and other advantages from manufacturers, enjoyed by chains with pur-

chasing power created by the fact that purchases are made for the entire organization.

I know that retail chain units are monopolizing the retail trade in the City of Minden because they are able to and do undersell their competitors, and that if something is not done to check the devastating effect of chain units underselling the smaller operators, it is only a question of time until there will be no retail units in said city except chains.

I know from my experience, and my knowledge of buying, covering a period of 25 years, that the greater the amount of purchases, the greater the buying power, and the greater the advantages afforded the operator. Further, that the greater the number of units in the chain or system, the greater the buying power, and the greater the opportunity for purchasing at lower cost, the lower cost of distribution, the lower cost in advertising, and the greater the many other advantages accruing to such operators.

I know that all the retail units of a system or chain, wherever situated, contribute to the purchasing power created by the entire set of units. This power enures to the benefit of each unit, and gives each unit the multiple advantages growing out of the operation of a chain system of retail stores.

I have been in the retail business, selling groceries and meats, for a number of years and am thoroughly familiar with the trade. Throughout the United States grocery stores carry the same general line of merchandise.

With one exception, the chain retail units in the City of Minden do not own the buildings in which they operate, and the one that does own its property is a sectional chain operating only ten stores.

I know that chain stores, as a rule, do not co-operate with the permanent citizenship of the local community in furthering the activities which build up a community.

W. C. Sugg (R. p. 190).

I am a resident of the City of Minden, Webster Parish, Louisiana. Since 1917 I have been actively engaged in operating one store where merchandise is sold at retail.

My business has the same financial backing as the average independent merchant throughout Louisiana. Until recent years, I made reasonable returns on my investment and made sufficient money to enable me and my family to enjoy the necessities and comforts of life enjoyed by the average American family.

After Minden had developed into a prosperous city of some 6,500 people and had built churches, schools, paved streets, and made other public improvements, all built at the expense of the permanent residents of the community, various and sundry chain operators, some national, some sectional, found that the permanent residents of Minden had built a splendid city, and saw fit to establish therein retail units of their system.

Chain units in practically all lines of business have been established in Minden. These units are housed in

rented properties. Generally, the chains brought their own employees, paid small wages, and set out to undersell the long established businesses of Minden, and thereby destroy the local and independent merchants who had, through the years, built up said community.

Prior to the influx of the chain, there was abundant competition among independent merchants, but all competitors were on the same footing; that is, they were all compelled to buy from wholesalers for the reason that they did not purchase goods in sufficient quantities to warrant direct buying from the manufacturer. They all paid their proportionate share of the taxes, practically all owned their own buildings, and, in general, operated in the same manner. This competition, prior to the influx of the chain retail units, gave the consuming public the benefit of any low cost.

The situation, prior to the influx of the retail chain units in the city, developed men of character and independence, furthered independent thought and was conducive to better citizenship. Ownership of their homes and places of business created a hope and enthusiasm enjoyed only by those living under such conditions.

By underselling local independent merchants, chains are gradually eliminating the independent merchants. One by one they have taken bankruptcy or gone into the hands of a receiver. To meet chain store prices, independents are compelled to operate at a loss. Unless some action is taken to place the independent merchant on a fairer plane and better enable him to compete with the retail chain units, it is only a question of time until there will not be

an independent merchant left in Minden. This statement is true of practically every line of business.

I have endeavored to keep abreast with the modern trend of marketing and buying. I have attempted to purchase as near the source of manufacture as possible; have demanded that goods be sold to me as cheaply as anyone else, and have demanded discounts, advertising allowances, brokerage fees, and other allowances that are not shown on the face of invoices that are allowed chain operators, but same have been refused.

I have read Paragraph 88 of the answer filed by the State in this suit. I received no such allowances or discounts from anyone from whom I purchase goods, as is shown in said list, although I have demanded them.

I carry the average size stock of goods that is usually carried by an independent merchant; my purchases are not sufficiently large to warrant shipments in carload lots. Chain operators competing with me have a great number of units, one of them 47, and one 10, and others with more than 10, which enable them, because of the purchasing power created by all units, irrespective of location, whether within or without Louisiana, to buy and ship in carload lots to their centrally located warehouses, and distribute the merchandise to their individual retail units. My purchases are not sufficient in quantity to warrant such operation; my merchandise is shipped by packages, usually by local freight or express.

Based on my experience, I know that, as a general proposition, the greater the number of retail units op-

erated by a chain, the greater the purchasing power of the chain, and the greater the discounts, advertising allowances, and other concessions given to chain operators by wholesalers and manufacturers; that when an operator has several retail units, he can avoid buying from the wholesaler and purchase directly from the manufacturer, and purchase larger quantities and thereby save the wholesale commission, together with lower cost of transportation.

I know that all of the retail units in a chain or system contribute to the purchasing power. This is true irrespective of their location.

In other words, if a retail chain operates 100 stores in Louisiana, 100 stores in Texas, 100 stores in Minnesota, 100 stores in Arkansas, and 100 stores in Mississippi, each retail unit, irrespective of location, contributes to the central purchasing power of the chain, it being the practice of the chains to have a central purchasing agency for their units, and behind each unit is thrown the entire purchasing power created by the entire chain or system.

If, for example, a chain of 15,000 units has only one unit in Louisiana, the entire purchasing power, created by all the units, is behind the one unit located in Louisiana. In other words, retail units outside of Louisiana contribute materially and substantially to the effectiveness of the operation of the retail unit in Louisiana in purchasing power, advertising allowances, and other advantages.

The greater the number of retail units, the greater the advantages accruing to the operator of the retail chain, and no maximum is reached. For example, when the retail

units are increased to an enormous proportion, the operator may engage in manufacturing, operating his own brokerage establishment, thereby making brokerage fees, and be in a position to demand further concessions from the manufacturers.

That over 50% of the retail business in Minden is done by chain organizations that have come into Minden after the city was established, after schools were built, after streets were paved and paid for. Chains came into the City of Minden for the reason that it was a splendid and thriving city.

The chains have moved into Minden and are now occupying buildings formerly occupied by independent merchants, who have gone out of business because of their inability to compete with the chains; that the chains are merely renting the properties in Minden, not for the purpose of building the town, as shown by the method of handling their business, but are operating solely and only for the purpose of underselling local independent merchants, and thereby obtaining a monopoly on the retail trade of the City.

I am familiar with the conditions in other cities and towns in Northwest Louisiana, and know that the conditions in the entire section are the same as those existing in the City of Minden, with reference to the influx of retail chain units.

I come in contact daily with persons who have been independent, prosperous retail merchants in days gone by, men who have contributed their energy and funds in the up-

building of said cities, and who have been unable to compete with the operators of the retail chains in said cities; that some of these men are out of employment, and some of them have been employed by the chains at meager salaries.

If independent merchants continue to decrease, and the chains increase, as they have in the City of Minden, since 1925, it is only a question of time when chain units will be the only retail units operating in the City of Minden, which condition is not favored by thinking persons, and is not conducive to the welfare of the people of this locality.

A. A. Allen (R. p. 202).

I have been engaged in the retail grocery business for a number of years, and now own and operate two retail grocery units in the City of Baton Rouge.

For six years I was general manager of a grocery chain in Baton Rouge, consisting of 32 stores. I am thoroughly familiar with the operation of chain units. The policy of the chain organization for which I worked, and which now has a monopoly on the retail grocery cash and carry business in Baton Rouge, was to destroy competition, and in the territory covered by this chain, this aim has been accomplished.

It was the policy of the chain that employed me to open units next to independent retailers and to slash prices to such an extent that the independent retailer was forced to close his doors, the chain being in a position, because of its size and financial backing, to take advantage of and destroy the independent operators.

Attacks on independent merchants by the chain which employed me was systematically carried out until said chain has a monopoly on the retail grocery trade in the territory within which said chain operates. It was a part of my job, while employed by the chain, to engineer the operations of the chain for the purpose of destroying said competition, as set out in my testimony.

The policies described in my testimony, which include the attacks on independent merchants and smaller retailers, was made possible by the fact that the chain which employed me operated a number of units and enjoyed a larger purchasing power and other advantages accruing to the operators of multiple stores.

I know that each unit in a chain contributes to the central purchasing power of said organization as a whole, irrespective of the location of the units, and that the power of advantages created by the whole is behind each unit.

Illustrating the above statement, the coffee buyer of the Great Atlantic & Pacific Tea Company buys the coffee for all the units operated by said concern. Likewise, the central purchasing agent for the Great Atlantic & Pacific Tea Company buys all of the oleomargarine needed by the units of the Great Atlantic & Pacific Tea Company. In other words, every unit of the Great Atlantic & Pacific Tea Company contributes to the central purchasing power of the entire system, and that central purchasing power is behind each unit operated in Louisiana or elsewhere.

Further illustrating, while employed by a chain of 32 retail units in Baton Rouge, the Great Atlantic & Pacific Tea Company, with a lesser number of stores in Baton Rouge, purchased from a wholesaler in Baton Rouge oleomargarine at 2c a pound less than the wholesaler would sell it to my chain. The wholesaler explained the price which the Great Atlantic & Pacific Tea Company paid was set by the manufacturer in Chicago, and was furnished the stores of the Great Atlantic & Pacific Tea Company of Baton Rouge under a contract with the central purchasing agent of the Great Atlantic & Pacific Tea Company, which agent purchased all of the oleomargarine that would be used by all of the retail units of the Great Atlantic & Pacific Tea Company over the United States. This shows conclusively the enormous purchasing power created by the entire system of the Great Atlantic & Pacific Tea Company is behind each unit operated in the system. The benefits that accrue by virtue of the operation of multiple units enures to every unit operated. Chain operators, by virtue of their enormous purchasing, can, and do destroy years of work and building by jobbers and wholesalers. Illustration: When a wholesaler builds up a demand in a community for a certain product, if the wholesaler refuses to meet the demands of the chain organization in respect to discounts and allowances, it is the practice of chains to purchase the product elsewhere and retail it in competition with the same commodity sold by said wholesaler, and, if necessary, even sell it below cost until the wholesaler meets the demands of the chain or quits handling the commodity. If the wholesaler quits handling the commodity, the chain can then buy from the manufacturer, and name its own retail price.

Chain organizations will not come into a city or town unless it is a thriving community, one that has been built up by the permanent citizenship, one with schools, churches, roads and public improvements completed, and no better example of this exists than the City of Baton Rouge. Third Street, the principal street of the City, originally lined with stores operated by independent merchants, which merchants built the City of Baton Rouge, paid taxes and paved the streets, built schools and established a desirable place in which to live, is now lined with chain stores in practically every line of business, and there are only two independent firms of any consequence left on said street.

Illustrating: F. W. Woolworth has a store on Third Street in a building formerly occupied by an independent merchant. The entire purchasing power and all advantages accruing to the Woolworth chain is behind this unit. The same can be said of every chain unit on Third Street, and on the other streets in the City of Baton Rouge.

The onslaught made on the City of Baton Rouge by chain stores is a menace to the community, and chain ownership does not develop good citizenship. The conditions described in my testimony as existing in Baton Rouge are similar to those existing elsewhere in Louisiana.

A person who owns his own business is more interested in the upkeep of the town, its developments, and makes a better citizen than a person employed in a chain unit where he is simply a part of the machine, and receives a meager wage.

Each of my retail grocery units contribute to my purchasing power.

E. M. Steen (R. p. 200).

I am the owner of the Jitney Jungle stores in Monroe, Lake Charles, Rayville and West Monroe. I own and operate a total of eight stores. I can buy my goods cheaper than the independent grocers can purchase them for the reason that I buy in larger quantities. I know that the greater the number of units in the chain, as a general rule, the greater the purchasing power, and other advantages.

I know that it is impossible for me to compete with an organization with the purchasing power of the Great Atlantic & Pacific Tea Company, first, because the enormous purchasing power of this company gives them a decided advantage in rebates, and in the purchase of their goods; second, because their large operations permit them to operate upon a smaller margin of profit, and the Great Atlantic & Pacific Tea Company could operate at a loss in the towns in which I operate, and drive me out of business, and recoup the losses at other points where it has no competition.

I am in direct competition with the tremendous purchasing power enjoyed by the Great Atlantic & Pacific Tea Company, created by its entire chain. Because of the small size of my chain, I am unable to obtain any rebates sufficient to operate upon, and if I operated upon the small margin of profit as does the Great Atlantic & Pacific Tea Company, I would fail in business. The Great Atlantic & Pacific Tea Company increases its profits by the secret rebates paid to it by the manufacturers.

Joe Isaacman (R. p. 201).

I am Vice-President and General Manager of the Monroe Furniture Company, Ltd. We operate a chain of five stores situated in Louisiana and Mississippi. I know that the operation of multiple units has many advantages, such as enormous purchasing power, lower cost of administration, etc. The saving in the cost of the administration, and the saving in the purchase price as a result of the enormous purchasing power, enures to the benefit of each unit in the chain, and brings about a lower cost per unit for operation.

I know that most chains operate under a centralized banking system. They do not carry bank accounts in the communities where they operate, but merely use the local banks for depositing their money, immediately drawing exchange on New York for the forwarding thereof; that the account is one which the banks cannot use to loan, and is not profitable to the banks.

I know that in Monroe, none of the chains borrow from the local banks, but the same are all financed out of New York City. I know that none of the National chain stores in Monroe, of any size, own their own property.

I know that when I install a store in any locality which is a part of the chain with which I am connected, whether in this state or out of the state, I take into the locality the full amount of the purchasing power of the entire chain of which that chain is a member, and throw that purchasing power, and other multiple advantages, in direct competition with the other stores there. It is an

undisputed fact that the larger the purchasing power, the lower the original cost of the commodity, and the greater the advantages to the entire system. All of these advantages are enjoyed by each individual unit, wherever located.

Clark Faulk (R. p. 207).

I am a resident of Monroe, Ouachita Parish, Louisiana. For the past 30 years, I have operated a grocery business in Monroe, and at present I am practically the only independent grocer of any size left in said city.

Formerly, all grocery stores in Monroe were owned by local citizens. Then, the general method of doing business was to purchase their groceries from the local wholesalers. The chain stores now control over 90% of the grocery stores in Monroe.

Monroe is a city of approximately 30,000 inhabitants. Due to the growth of the chain stores in Monroe, practically all independents have been driven out of business. The chains purchase in such quantities that they can buy direct from the manufacturer, which an independent cannot do. It is a well known fact that chain stores purchase their merchandise for considerably less than I can, or any other independent can, and the only way I can keep my business at all is to extend credit which chains refuse to do. I attribute the fact that I extend credit as the only reason I am in business today.

I have been a resident of Ouachita Parish for 40 years; own my own property. If something is not done to equalize my business with the enormous purchasing

power brought into this locality by the chain stores, it will only be a question of time until the entire grocery business will be operated by chains.

J. W. Baker, J. S. Trisconi, J. W. Elston, W. C. Marshall, and J. H. Brown
(R. p. 209).

We are independent wholesale grocers, domiciled in Louisiana, and serving the independent retail merchants of northwest Louisiana. We know that retail chain store units have an advantage in the matter of taxation, as compared to independent retailers, by reason of the enormous purchasing power created by all the units in a chain. The chain can purchase directly from the manufacturer, which saves in taxes that are paid by wholesalers from whom independents are compelled to buy, and which taxes are included in the purchase price of the merchandise purchased by independents.

We are called upon frequently to make substantial contributions to local charity and local civic organizations. This outlay runs into thousands of dollars a year. These obligations to the community are generally avoided by chain stores.

Within the past ten years in our trade territory, three wholesale grocers, well established for over 25 years, have liquidated their business due to inability to operate profitably because of reduced volume of business, due to a considerable extent to diversion of volume from independent retail merchants to chain stores. If the large National chain stores are permitted to continue operating with un-

fair advantages, it will eliminate a large number of independent merchants, which would tend to create a monopoly, increase unemployment and be ruinous to the public.

It is a fact, well known to us, that the chain store method of merchandising tends to disregard the local independent wholesale grocers. The stores owned by these chain systems, whether they be one or many within our State, draw their supplies from scattered warehouses, mostly out of the State, owned and maintained by their system. If a chain organization, therefore, has within the State only one store, and in other states thousands of stores, that one store has the same advantages as the stores located outside the boundary of the State.

C. B. Ellis (R. p. 198).

I am a resident of East Carroll Parish, Louisiana. I am one of the owners of Ellis Stores, Incorporated, a Louisiana corporation, which operates five stores, three in Louisiana, one in Mississippi, and one in Arkansas.

My stores sell in competition with Kress and Woolworth, and smaller chains and independents selling the same class of merchandise.

I managed a store operated by S. H. Kress Company for six years, and I am familiar with the operation of the larger chain retailers.

From my knowledge obtained while employed by Kress, and while operating my present five stores, I know of my own knowledge that the greater the number of units in a chain, the greater the purchasing power of the whole system, which is usually done by a central purchasing agent.

I know from my own experience, above referred to, that all the units of a retail chain contribute to the central purchasing power of the chain or system, and this is true irrespective of state lines, and location of stores. Illustrating, my store in Mississippi and my store in Arkansas contribute to the purchasing power of my chain of five stores, just as much as if they were located in the State of Louisiana, and the fact that the two stores are across State lines, makes no difference in the multiple advantages accruing to me by virtue of the fact that I operate a chain of five stores.

Among the multiple advantages accruing to me by virtue of the fact I operate five stores, are that I enjoy an advantage in purchasing power, lower cost of distribution, lower cost of operation, and the like, over a person operating four stores, or three stores, or two stores, or the independent merchants, and likewise the operator of six or more stores has a distinct advantage over me. In other words, the greater the number of units in a chain, the greater the advantages accruing to the operator in purchasing power, cost of distribution, etc.

The larger chains enjoy a distinct advantage over my chain of five stores in that they can afford, and do afford, instructors who train the managers and other personnel in the stores in the art of properly displaying their merchandise and commodities. I know, of my own knowledge, that this is a distinct advantage. I know that the greater the size of the chain, the greater the ability to keep experienced buyers at the source of supply, thus obtaining better prices. For example, when I was employed

by Kress, that Company kept a buyer in France, purchasing Val Lace, and as a result, obtained merchandise at a lower price than the smaller chains could; the independent merchants could not in any manner enjoy this privilege. I know that the greater the size of the chain, the greater the opportunities to avoid buying from jobbers and wholesalers, and the greater the ability to buy direct from the manufacturer, thus obtaining much lower prices.

I know that persons owning their business are better citizens, and have a greater interest in upbuilding the cities in which they live.

B. Morgan (R. p. 208).

I reside at Jasper, Jasper County, Texas. I am general manager and purchasing agent for Morgan & Lindsay, and have been since the organization in 1921. We operate 28 stores in the State of Louisiana.

I know that the National Chain Stores have an advantage over the Morgan & Lindsay stores, because of their buying power. They receive rebates and advantages and allowances that the Morgan & Lindsay stores are not able to obtain.

I know that many factories refuse to sell to Morgan & Lindsay merchandise because all their production and output is taken up by the National Chains.

W. E. Penick (R. p. 211).

I reside in New Orleans. I am Vice-President of the H. G. Hill Stores, Incorporated, and as such, I am Executive Head of such corporation.

The Great Atlantic & Pacific Tea Company has filed a suit entitled, "The Great Atlantic & Pacific Tea Company, plaintiff, v. Alice Lee Grosjean, Supervisor of Public Accounts, et al." attacking the constitutionality of Act No. 51 of the Louisiana Legislature for the year 1934. In the bill of complaint, The Great Altantic & Pacific Tea Company averred as follows, to-wit:

> "• • • That said corporation (referring to H. G. Hill Stores, Inc.) is engaged in the State of Louisiana in precisely the same character of business as plaintiff under the same conditions • • • (Article #15 of Bill of Complaint)."

This statement is not correct and is misleading. I, therefore, feel compelled to point out to the Court some of the essential differences between the operation of chains of great magnitude, such as The Great Atlantic & Pacific Tea Company, and the operations of small chains, such as the H. G. Hill Stores, Incorporated, local wholesale jobbers and independent retailers.

The H. G. Hill Stores, Inc. is a local organization having neither a sectional nor national scope. Its purchasing power is limited to and by the needs of its ninety-two (92) stores. The purchasing power which it possesses may properly be compared to that which is possessed by a number of other local wholesale jobbing houses, many of whom purchase merchandise for and service a greater number of stores than belong to the Hill Store Organization. Contrast this with the operations of a chain such as the Great Atlantic & Pacific Tea Company which possesses a purchasing power so great as to enable it to fill the requirements of its fifteen thousand two hundred retail outlets. The advantages which accrue to a chain such as the

Great Atlantic & Pacific Tea Company as a consequence of its great purchasing power and from other factors which work in favor of an operation possessed of the bigness and wide scope of the Great Atlantic & Pacific Tea Company are obvious. They are such as to definitely and completely differentiate its operations from those of the small chain, the local wholesaler and the independent retailer. Some of the many material advantages possessed by a large chain of the type of the Great Atlantic & Pacific Tea Company which serve to differentiate its operations from those of the small chains such as the H. G. Hill Store, the local wholesale grocer and the independent retailer are the following:

(1) The Enormous Purchasing Power of the Great Atlantic & Pacific Tea Company places it in a superior position. (Sales approximate one billion dollars per annum and have exceeded this figure—sells one-tenth of all food sold at retail in the United States of America.

(a) RESULT—Manufacturers pay the sum of $6,105,000 per annum to the Great Atlantic & Pacific Tea Company by way of special, secret concessions and rebates over and above the usual trade discounts and rebates. Similar sums have been received by it in preceding years. These facts have been admitted by the duly accredited representatives of the Great Atlantic & Pacific Tea Company in their testimony before the Special Committee appointed by the House of Representatives to investigate the American Retail Federation. The testimony in part of their representatives appears on page #461 of the report of this Committee and is as follows, to-wit:

INTERROGATOR (MR. LUCAS): "IN OTHER WORDS, THROUGH THESE

CONTRACTS THE A. & P. CO. RECEIVED, IN REBATES, A TOTAL AMOUNT OF $6,105,000 FOR THE YEAR 1934?"

Mr. Gundrey, a duly accredited representative of the Great Atlantic & Pacific Tea Company testified:

"Yes."

"MR. CHAIRMAN, ONE MORE QUESTION. THAT DOES NOT INCLUDE YOUR PROFITS ON BROKERAGE?"

"MR. LUCAS: WHAT IS THE TOTAL AMOUNT." (Referring to discounts and brokerage).

"MR. GUNDREY: THE TOTAL AMOUNT IS $6,105,000, PLUS BROKERAGE EARNINGS OF ABOUT $2,000,000.

"MR. LUCAS: THEN YOU HAVE $8,105,000 IN REBATES AND BROKERAGE?"

"MR. GUNDREY: I SHOULD SAY, IN ROUND FIGURES."

At this same hearing it was also brought out that no special record was kept by the Great Atlantic & Pacific Tea Company of the manner in which it disbursed these special discounts.

These special rebates and brokerage give to the Great Atlantic & Pacific Tea Company a per store advantage of more than Five Hundred and Thirty ($530.00) Dollars per annum (year 1934), which in the nature of things cannot be obtained by small chains such as the H.

G. Hill Stores, local wholesale grocers, and other independent retail units.

(b) The Great Atlantic & Pacific Tea Company (and other large chains) operates its own brokerage companies which exact from those who would trade with it an additional sum of two million dollars per annum (year 1934) over and above the secret and confidential allowances and rebates received by it (See Report of Special Committee of the House of Representatives referred to previously) - - - Independent units and small chains cannot and do not obtain similar brokerage commissions.

(c) In addition to these special benefits amounting to $8,105,000 the sheer weight of the enormous purchasing power of the Great Atlantic & Pacific Tea Company places it in a buying position vastly more favorable than that of independent units and small chains. It is with difficulty that the tremendous purchasing power of this chain and other similarly situated can be visualized. It will, however, suffice to point out the size of some of its purchases:

1. PURCHASED 210 MILLION POUNDS OF BUTTER. (calendar year 1934).
2. PURCHASED SEVEN MILLION FIVE HUNDRED THOUSAND HENS. (calendar year 1934).
3. OTHER PURCHASES MADE ON EQUALLY GRAND SCALE.

The advantages gained as a consequence of this great purchasing power manifest themselves in many ways and cause the operations of the great chains such as the Great Atlantic & Pacific Tea Company to differ basically from those of the small chain, the local wholesaler and independent retailer. The following illustration will serve

to indicate one of the many benefits which flow from such a large purchasing power as is possessed by the Great Atlantic & Pacific Tea Company and other similarly situated chains. - - - ILLUSTRATION:

> A canner having a surplus of, let us say, ten thousand cases of canned goods would and will sell this block of merchandise in its entirety to one of the great chains such as the Great Atlantic & Pacific Tea Company for a measurably lesser figure than he would to the local wholesaler, the independent retailer or a chain the size of the H. G. Hill Stores, whose requirements would only permit the purchase of only a portion of the canner's surplus stock, say five hundred or one thousand cases. This is true because the canner by selling the entire surplus is enabled to immediately release the monies which he has tied up in this merchandise and also eliminate all further sales expense and effort.

(d) The operations of the Great Atlantic & Pacific Tea Company and other large chains are nationwide in scope, extending even into the Dominion of Canada. As a result of this broad geographical spread, the Great Atlantic & Pacific Tea Company is not dependent upon the prosperity or lack of prosperity of isolated communities. The insurance and safety afforded by this geographical spread cannot be enjoyed by small chains or independent units.

(e) The nationwide scope of the Great Atlantic & Pacific Tea Company, and to a lesser extent, certain other large chains permits the use of national advertising, particularly radio broadcasts on chain hookups and the employment of talent of the highest caliber, the cost of which would be prohibitive to the small chain and the wholesale grocer or the independent merchant. It is further to be noted that the advertising of

the Great Atlantic & Pacific Tea Company for several years was conducted without cost to the Company, they having received the equivalent of their advertising expenditures in the form of secret rebates and allowances. (See Special Investigation, American Retail Federation, House of Representatives).

(f) The Great Atlantic & Pacific Tea Company's size and great purchasing power permits the organization of a buying department having twelve (12) field offices dotted throughout the country, each located at the primary markets for the important commodities and items which it purchases.

(1) Each field office is in charge of a specialist and these offices are supervised by the Company's central purchasing department in New York, which co-ordinates their activities. The field offices are, as pointed out above, located in the principal center of production and primary markets for the commodities which the Company requires. Illustrative of this is the fact that the California purchasing office buys all of the canned fruits and canned fish; most of the supply of these products for the United States being packed in that geographical area. The Louisiana office purchases the entire rice requirement for the entire chain as the market for this commodity is located in the State of Louisiana. Similarly, the Chicago office which is located in the heart of the section where peas and corn are canned, likewise purchase the chain's entire requirement of these articles. The other field buying offices are located to equal advantage for the products that they buy.

(2) The cost of this plan of operation would be prohibitive to any company or companies unless they be possessed of purchasing power

such as that which the Great Atlantic & Pacific Tea Company possesses or at least vastly greater than that which is possessed by small local units not nationwide in scope. This scheme of operation results further in the Great Atlantic & Pacific Tea Company being able to keep more closely attuned to the prices and supply of the commodities which it requires and to build up statistical data and information as to the markets and market conditions, which would be prohibitive to small chains, local wholesalers and the independent retailer.

(g) Enormous purchasing power permits The Great Atlantic & Pacific Tea Company and other large chains to manufacture and can many of the articles which they sell at retail. This results in an integrated operation which places the large chain in a different situation from that of the small chain, local wholesaler or independent retailer. By manufacturing a substantial portion of its requirements it can convert into a profit many of the costs (manufacturer's profit, sales expense, etc.) which are passed on to the small chain, local wholesaler or independent retailer. The importance of the manufacturing activities of the Great Altantic & Pacific Tea Company can be better judged when it is realized that they manufacture;

80,000 TINS OF SALMON DAILY,

2,000,000 POUNDS OF BREAD DAILY,

500,000 CANS OF EVAPORATED MILK DAILY,

72,000 JAMS AND PRESERVES DAILY,

and

INNUMERABLE OTHER ARTICLES ON A SIMILARLY GRAND SCALE.

One of the many benefits derived from these manufacturing activities can be illustrated, at least in part, in the following fashion:

> A large chain such as the Great Atlantic & Pacific Tea Company can operate and use the entire output of a plant operated for the purpose of canning evaporated and condensed milk. This plant can be operated on a competitive basis with those which exist in other canneries of evaporated or condensed milk. On the contrary, a chain the size of the H. G. Hill Stores or the largest wholesale grocer in New Orleans could not profitably maintain a similar canning plant since its total requirements would be insufficient to admit of the operations of such a cannery, on competitive price basis as its requirements would be too limited. The same illustration holds with equal force insofar as other items such as peas, corn, salmon, condiments, ketchup, jams, preserves and many other items are concerned, from which it can be seen that the Great Atlantic & Pacific Tea Company or other large chains are enabled to profitably take the entire output of a factory owned and operated by them and thereby secure not only the manufacturing profit but eliminate the selling costs. The small chains as the H. G. Hill Stores or other local wholesalers or independent retailers would have to pay the manufacturer's selling costs to the manufacturer or canner from whom they purchase these competitive items. These manufacturing profits and selling costs are considerable and would result in their having to pay a price different from that which would be paid by the Great Atlantic & Pacific Tea Company and other large chains, for similar articles.

(h) The Great Atlantic & Pacific Tea Company through its wholly owned subsidiary, The Ameri-

can Coffee Corporation, is the largest coffee merchant in the world. It purchases its own coffee in South America, imports it, roasts it and sells it itself. It has offices and agents in Columbia contracting planters and supervising crops in Brazil. For these reasons The Great Atlantic & Pacific Tea Company is able to sell coffee for measurably lower prices than it would be possible for independents or small chains. Only the sales volume of The Great Atlantic & Pacific Tea Company permits the profitable operation of its coffee subsidiary, The American Coffee Corporation. No small chain or independent unit could operate a subsidiary coffee corporation of this type to purchase coffee on the same basis as The Great Atlantic & Pacific Tea Company can as a result of its ownership and operation of the American Coffee Corporation. This assumes great importance inasmuch as coffee has long been recognized as one of the best grocery leaders and the value of this coffee subsidiary is reflected not only in the coffee purchases but also in the purchase of other grocery items.

(i) The effect of these advantages on the profits of large chains having enormous purchasing power and doing a tremendous volume of business throughout the country is best illustrated by the photostatic copies of tables which are appended hereto and made part hereof. (See original record in this case). These tables are found in Senate Document No. 87, 73rd Congress, 2nd Session, Brochure, Chain Stores Invested Capital and Rates of Return of Retail Chains, and represent comparisons of results obtained by small retail grocery chains and those of great magnitude. They prove conclusively that when a retail grocery chain possesses more than one thousand units it has, in the main, double the profit possibility possessed by small chains or independent

grocery units and they also show that the investment per unit diminishes in accordance with the size of the chain and that chains possessing more than one thousand units have a materially smaller investment per unit than those of small chains.

(j) The large chains make it a fundamental rule of operating policy to acquire little, if any real estate in the communities in which they are doing business. Your affiant is informed and believes that the Great Atlantic & Pacific Tea Company does not own a single piece of real property in the State of Louisiana, not even its warehouse, whereas the H. G. Hill Stores, Inc. has substantial sums invested in real estate as do virtually all of the independent retailers and wholesale jobbers operating in this area.

I have read the affidavit signed by one David G. Bofinger, executed on January 2, 1936, wherein the said Bofinger states that he is of the opinion that the H. G. Hill Stores receive "allowances and discounts as great as those received by the Great Atlantic & Pacific Tea Company on the great bulk of their purchases, if not on all of them." This statement is erroneous and untrue. The allowances, rebates, discounts and special advantages reaped by the Great Atlantic & Pacific Tea Company are many times greater than those received by the H. G. Hill Stores when computed and compared on a per store basis, on the basis of dollar sales, in the aggregate, or on any other basis of comparison that may be used.

My information as to the special allowances, rebates, discounts and simulated brokerage profits of the Great Atlantic & Pacific Tea Company was obtained from

the testimony adduced at the Congressional investigation conducted during the months of June and July, 1935, and sometimes styled the Patman Investigation. At and during the course of this investigation, duly accredited representatives of the Great Atlantic & Pacific Tea Company testified and the record reveals with absolute certainty that this corporation (the Great Atlantic & Pacific Tea Company) did obtain special discounts, allowances, rebates and simulated brokerage profits in excess of the sum of eight million dollars and there was additional evidence to corroborate the fact that these were not all of the concessions received by the Great Atlantic & Pacific Tea Company. The uncontroverted testimony further shows that the Great Atlantic & Pacific Tea Company, because of its tremendous purchasing power, stands in a class by itself and does receive quantity discounts which are unavailable to concerns of small stature as the H. G. Hill Stores, Inc., which concern possesses but eighty-six (86) units as contrasted with the fifteen thousand two hundred (15,200) units contained in the Great Atlantic & Pacific Tea Company chain. The effect of these discounts, allowances, rebates, etc., is to give a per store advantage many times greater than a concern such as the H. G. Hill Stores or any other similar company can possibly receive. In fact, on the basis of the Great Atlantic & Pacific Tea Company receiving an allowance of eight million dollars as a consequence of these concessions, special discounts, and brokerage fees, this sum gives to it a per store allowance of more than Five Hundred Dollars ($500.00) per unit for each and every one of the fifteen thousand and two hundred (15,200) units embraced in its chain, which is again many times more than the allowances and discounts applicable to the individual units

of the H. G. Hill Stores. These concessions, rebates and brokerage fees when computed on the basis of dollar sales, give to the Great Atlantic & Pacific Tea Company again an advantage many times greater than that of the H. G. Hill Stores.

In addition to these concessions, rebates and brokerage fees, the Great Atlantic & Pacific Tea Company enjoys further advantages in that it manufactures many of the articles that it sells and reaps a further profit which is not available to the small units such as the H. G. Hill Stores, Inc.

The foregoing is not designed to be a compendium of all of the vast differences that exist between operators of the type of the Great Atlantic & Pacific Tea Company and that of a chain having an infinitesimal number of units, by comparison with that of the Great Atlantic & Pacific Tea Company.

There are numerous other differentiating factors but I believe that the foregoing suffices to show that any comparison of the operations of the Great Atlantic & Pacific Tea Company with that of a small chain is inaccurate, misleading and unfair unless the foregoing factors be taken into consideration.

Jas. T. Burns (R. p. 250).

All of the retail units in a chain contribute to the purchasing power enjoyed by each unit in the chain, irrespective of the location of the retail units. Chain store tax, with the rate fixed by the number of retail units in the State, does not properly classify the chain according

to the type of business done, or the privilege enjoyed in the State of Louisiana, for the reason that all of the units in the entire chain contribute to and increase the per unit advantage of each unit in Louisiana.

I am a resident of the Parish of St. Tammany, Louisiana, and since 1932, I have represented said Parish in the House of Representatives of the Legislature of Louisiana, and was a co-author of Act 51 of 1934.

Lorris M. Wimberly (R. p. 252).

I am a resident of Bienville Parish, Louisiana, and since 1928, I have represented said Parish in the House of Representatives of the Legislature of Louisiana.

Since 1928, and some time prior thereto, I have observed the rapid growth and development in Louisiana of chain stores; I have made a study, the beginning of which dates back prior to 1928, of the effect of the rapid growth of chains, and their methods, upon the independent retailers in the State of Louisiana, and the effect of the methods of doing business practiced by the larger chains, as related to the smaller chains.

Since 1920, I have seen the various national chain organizations with their enormous purchasing power, and other advantages accruing by virtue of their operation of multiple units, come into the City of Shreveport, in the Parish of Caddo, Louisiana, and because of their ability to undersell the independent merchants, have forced the independent merchants in said City, to a large extent, out of business, this being especially true of the establishments

formerly located on Texas Street, in the City of Shreveport, which street was the principal avenue of business in 1930, and that now instead of said businesses on said street being independently owned by the citizenship of the City of Shreveport and surrounding territory, with few exceptions, the large business houses are operated by national and sectional chains.

These conditions described above also exist in the City of Monroe, Parish of Ouachita, in Northern Louisiana, and in the City of Alexandria, situated in the Parish of Rapides, State of Louisiana, and that now, and for the past three or four years, said national and sectional chains have been extending their operations into the smaller communities and towns and are now competing with the independent merchants in said smaller communities and towns, and that if something is not done to remedy the situation, it will be only a question of time before the same circumstances are existing in the smaller towns and communities as exist in the cities of Shreveport, Monroe and Alexandria, and other cities in Louisiana, that is, the retail business of the towns and communities being practically monopolized by chain operators.

It is the exercise in Louisiana by said chains of the enormous purchasing power created by the great number of units operated by the chain, together with the advertising advantages, discounts obtained by virtue of the enormous purchasing power, reduction to a minimum of overhead operating expenses, the ability to maintain expert buyers in the various fields of production and the many other advantages accruing to the operators of multiple

retail units that enable the chain operators to sell at such prices as render it impossible for an independent retailer or small chain operator to exist.

I know that the greater the number of retail units the greater the purchasing power of the chain, and that each retail unit contributes its pro rata part to the creation of the multiple advantages accruing to the chain operator, the entire number of units being one system with, ordinarily, one central purchasing agency.

I know it was the condition herein described that the Legislature of Louisiana in the passage of Act No. 51 of 1934, sought to remedy.

Since the year 1928, I have been cognizant of the rapid growth and encroachment upon the retail field of chain stores in Louisiana, and recognized the necessity of the Legislature of Louisiana taking such action as is necessary to protect the welfare of its citizenship.

I know that the Legislature, as evidenced by the passage of said Act, and I individually, believe and are of the opinion that the State of Louisiana, in its sovereign capacity, should encourage individual initiative among its citizenship, and individually owned stores, in preference to chain ownership, for the reason that a person makes a better citizen when he owns his own business establishment and is not a mere employee at a meager wage of some gigantic corporation whose officials he does not know, and whose officials do not recognize his needs and wants, and the employees accept work with the organization solely and only because, by reason of the size of the organization, he

is unable to operate as an independent retailer and own his own establishment.

I know that when an individual citizen of Louisiana is unable to operate by reason of chain operations in his respective community, such condition operates against the general welfare of the State of Louisiana, and is a condition that the Legislature of Louisiana should take cognizance of and rectify, and it was these conditions and circumstances that the Legislature had in mind in the passage of the Act attacked in the present litigation.

I believe that the method of arriving at the amount of tax due, as provided in Act No. 51 of 1934, attacked herein, is the fairest method of recognizing the multiple advantages accruing to the operators of a chain system, for the reason that the total number of stores or retail units in a chain determine the rate of the tax, and the greater the number of units the greater the advantages enjoyed.

For example, a chain of fifteen thousand retail units operating throughout the entire United States, with one hundred stores in Louisiana, cannot fairly be classified as operating under the same circumstances as a chain with one hundred stores with all of them situated in Louisiana. On the one hand, the large chain has a central purchasing agency with power and finances to purchase for fifteen thousand retail units, while on the other hand the purchasing power of the smaller chain with one hundred units does not have the financial backing that the larger chain has and is not in a position to obtain the prices nor concessions that can be obtained by the larger chain.

I know that the larger chain could purchase, for example, the entire output of a factory, or buy in train load lots, while the small chain could purchase probably only by car load lots or less. The operator with one hundred units, however, would enjoy an advantage over the operator of a smaller number of units, such as ten units, and the operator of ten units would in turn enjoy a distinct advantage over the operator of an independent establishment. In other words, I know that the larger the number of retail units in the organization, the greater the purchasing power, and the greater the advantages accruing to the operator.

The present chain store tax was enacted by the Louisiana Legislature after careful study and deliberation in both Committee, the House and Senate, and after both the chain organizations and others had had an opportunity to present their side of the case.

James D. Huck, Jr. (R. p. 226).

This witness is a certified public accountant, authorized to practice in Louisiana. His testimony consisted of an analysis of the financial statements offered in evidence by appellants to show wherein the statements filed could not be taken as an accurate account of their Louisiana operations. His testimony involves considerable detail. Should the Court consider the financial statements offered by appellants, which were objected to by respondents, as being irrelevant and immaterial, admissible testimony, the Court is respectfully requested to study the testimony of Mr. Huck.

Objections to Appellants' Testimony.

(See Stipulation, R. p. 81).

Respondents objected to all testimony offered by appellants relating to earnings, gross sales, etc., on the ground same is irrelevant and immaterial and has no bearing on the case. Said objections are here re-urged (See stipulation, R. p. 81). The Legislature is not required, when classifying businesses for the purpose of taxation, to look into the question of whether the tax means the difference between a profit and a loss. See *Fox v. Standard Oil Company of New Jersey, infra.*

The objection was also urged, and is here re-urged, that even if the testimony was admissible, the figures contained in the statements are insufficient to justify the Court in drawing a conclusion therefrom (See stipulation, R. p. 81).

Summary of the Testimony of Charles W. Parr and F. W. Gundrey, Officials of the Great Atlantic & Pacific Tea Company.

[See stipulations (R. pp. 83, 84); also Hearing before a Special Committee of House of Representatives of United States Investigating American Retail Federation, 74th Congress, 1st Session, during months of June and July, 1935, pages 429-501].

The Great Atlantic & Pacific Tea Company is a foreign corporation, operating 15,200 retail grocery stores, with Headquarters in New York City. The capital stock consists of a small issue of preferred, and approximately two million shares of common. Seventy-five per cent of

common stock is owned by the Hartford family, which family controls the company.

The Great Atlantic & Pacific Tea Company has field buying offices in San Francisco, Seattle, Minneapolis, Chicago, Rochester, New York, New Orleans, Baltimore, and two in New York City. These sub-buying offices are situated near the point of production or manufacture.

In 1934, The Great Atlantic & Pacific Tea Company received over $6,000,000.00 in allowances and secret rebates. These did not show on the face of the invoices covering the purchases by the company from manufacturers.

The Great Atlantic & Pacific Tea Company received in brokerage commissions during 1934, $2,000,000.00. The total profit in rebates and brokerage fees made by The Great Atlantic & Pacific Tea Company during 1934, amounted to $8,105,000.00.

In addition to the rebate and allowances referred to above, which do not appear on invoices, The Great Atlantic & Pacific Tea Company received additional rebates, allowances and discounts off the invoices on the various products it purchases.

Because of the enormous purchases made by The Great Atlantic & Pacific Tea Company, it owns and operates its own brokerage agencies near the points of production. The usual brokerage fee is charged by said agencies when purchases are made from producers or manufacturers, and this fee and profit enures to The Great Atlantic & Pacific Tea Company.

The Great Atlantic & Pacific Tea Company, as admitted by Mr. Parr, owns and operates warehouses and does not buy from wholesalers, but buys direct from factories, thereby performing functions of an ordinary wholesaler. The Great Atlantic & Pacific Tea Company, therefore, makes the profit usually made by the wholesaler.

It was admitted by Mr. Parr that The Great Atlantic & Pacfiic Tea Company demands these secret rebates or advertising allowances from manufacturers, and if they are not given, the merchandise manufactured by the person refusing the secret discount or rebate is not "pushed" by the retail units of The Great Atlantic & Pacific Tea Company, and, if possible, the goods are not stocked in its retail units.

Mr. Parr admitted that an independent merchant buying from a wholesaler in smaller lots will pay more for merchandise than one buying in greater quantity from a producer.

The Great Atlantic & Pacific Tea Company in 1934 paid a dividend of $7.00 per share on preferred stock, and $7.00 per share on common stock. To pay the common stock dividend required $14,000,000.00. An amount sufficient to pay more than 50% of this dividend was received by The Great Atlantic & Pacific Tea Company in secret rebates and allowances, viz., $8,105,000.00.

According to the Federal Trade Commission Report, quoted at said Committee Hearing, The Great Atlantic & Pacific Tea Company is the most conspicuous chain which is the sole recipient of straight volume allowances, and in

many instances, The Great Atlantic & Pacific Tea Company is the only one receiving allowances from concerns that are selling to other chains. Mr. Parr admitted that the brokerage paid the company's brokerage agencies enures to The Great Atlantic & Pacific Tea Company.

The Great Atlantic & Pacific Tea Company, appellant herein, prepared and filed with a Committee of the House of Representatives of the United States, a list of the manufacturers from whom it purchases merchandise, showing the name of the manufacturer, the type of secret rebate and discount, and in some instances, the amount. This list appears in the Record at pp. 66-79, both inclusive. (See also hearings before Committee of House of Representatives, 74th Congress, 1st Session, held in June and July, 1935, at pp. 464-471, both inclusive; said list forms a part of this Record. See Stipulation (R. p. 83, Paragraph 5) and stipulation (R. p. 84).

Documentary Evidence Offered By Appellees.

Senate Document No. 85, 73d Congress, 2d Session, Page 104. (See Stipulation R. p. 84).

"THE COMPETITIVE ADVANTAGES OF SIZE.—Competition between chain-store companies, or between chain stores and independent merchants, is for the most part of a local character; that is to say, it is competition in the sale of goods at retail to customers whose patronage is largely confined to the locality in which they live, and for that reason both chain and independent competitors are primarily concerned with price comparisons between stores in the same locality. This is well illustrated in the statements which the chains make on questions of

price policy. When asked to give the reasons for price variations between stores, competition is named more often than any other reason. When asked to state who has authority to adjust prices to meet competition, the answers almost invariably reflect some means whereby local competitive situations may be met by local price adjustments.

"In a competitive field made up in this way of numerous more or less isolated competitive points, the retailer who operates a large number of stores situated throughout a wide area enjoys a strategic advantage over a competing retailer who operates fewer stores or whose stores are confined to a more limited area. Such stragetic advantage of the large chain is greater, of course, in competition with the independent retailer who operates only one store. The source of this advantage lies in the fact that the multiple-store retailer has the opportunity of averaging the profit results obtained from its stores in the several localities where it operates. If the store in one locality is operating under severe competitive conditions and producing a net loss, its losses may be, and under normal business conditions probably would be, offset by the profits earned in the other stores.

"To illustrate the advantage of this averaging process to the large chain it may be assumed that in a given locality the number of chain and independent stores attempting to do business is greater than the demand in that community can profitably support. Should one of the independent retailers or one of the local chains initiate price cuts in an effort to obtain what business is available, the large chains are put upon the defensive in that locality. It is obvious that they can meet the reduced prices of their competitors and continue the operation of their stores in that locality almost indefinitely if, as would usually be the case, they are

operating stores in other localities where competition is less vigorous. The profits obtained from those other stores will enable the larger chains to survive the price warfare in the particular community for a longer period than any of the local competitors. If, as another illustration, it be assumed that the large chain takes the initiative in price cutting in a given community and cuts its prices below those of its local competitors, the profits derived from its other stores where such price reductions have not been made will enable it to continue to undersell the local stores for as long a time as the latter may be able to remain in business.

"As between chains of approximately equal number of stores and with equally wide distribution the averaging process affords no advantage, except in particular cases where one such chain happens to have fewer of its stores located in highly competitive localities than the other chain. It is between large chains and small chains and between chains and independent retailers that the averaging process becomes a significant competitive factor, and the essence of the process is the opportunity which it affords a large chain to derive revenue from one store or group of stores with which to conduct either defensive or offensive competitive warfare in other stores or groups of stores. The reserves and resources of a large chain may be immediately mobilized for offense or defense in any particular locality, but the independent competitors are not so organized as to permit those who are in quiet sectors to come to the aid of those who are in competitive difficulties.

"To this contention that the large chain enjoys a strategic advantage over its smaller, or more local, competitors it may be replied that the widespread activity of the large chain brings a compensating disadvantage in that it encounters competi-

tive price cuts and price wars at a greater number of points. This is undoubtedly true as a statement of fact, but it is not an offset to the advantage which the large chain derives from the averaging process. The smaller competitor may encounter such conditions less often than the larger chain, but when it does encounter them they are of relatively much greater importance to its total business. It is the fact that any severe competitive condition, when it occurs, bears much more heavily upon the smaller than upon the larger competitor that gives competitive significance to the averaging process. This fact is not negatived by the statement that for any given period of time the average large chain will encounter a greater number of separate competitive struggles than will any one of its smaller competitors. No one of the localized encounters, nor perhaps all of them put together, will affect so large a proportion of the chain's business as is affected for each of the independent competitors involved."

Senate Document No. 4, 74th Congress, 1st Session, Page 5. (See Stipulation).

"The three national grocery-store chains—the Great Atlantic & Pacific Tea Co., the Kroger Grocery & Baking Co., and the Safeway Stores, Inc. (including MacMarr Stores, Inc., acquired by Safeway in 1931)—operated during 1930 nearly 25,000 retail grocery stores with aggregate sales of almost $1,600,000,000. The Great Atlantic & Pacific Tea Co. alone operated 15,738 of these stores, with total sales of $1,065,000,000 during 1930.

"The significance of these figures is heightened by the apparent tendency of chain stores to increase at a faster rate than independents, • • • This indicates that while the opening rate of independent stores is substantially higher than that for the stores of chains, the independent closing rate is

nearly as high as their rate of openings, whereas the chain rate of closings is roughly one-fourth that of their openings."

In *Senate Doc. No. 4, 74th Congress, 1st Session, page 64*, the Federal Trade Commission states:

> "Much more than a mere possibility and, in fact, a strong probability exists that the effect of price discriminations by manufacturers which make it possible for chain stores consistently to undersell their independent competitors 'may be to substantially lessen competition' between them and 'tend' to the creation of a monopoly."

Senate Doc. No. 4, 74th Congress, 1st Session, containing the final report of the Federal Trade Commission on its chain store investigation, at *page 78*, states:

> " - - - There has been a wide recognition, however, of the economic problem involved in the growth and threatened dominance of chain distribution, which is but one phase of the problem of monopoly."

In *Senate Document No. 4, 74th Congress, 1st Session*, at *page 86, Section 1*, the Federal Trade Commission, in part, states:

> "Should the trend of the past 20 years and particularly of the last decade continue for a like period, we shall have a condition in some lines of chain-store merchandising that few will dispute is monopolistic."

Summary of Argument.

Act 51 of 1934 levies a license or privilege tax on the privilege of operating a retail store or stores in multiple form in Louisiana. It is within the authority of Legis-

lature of Louisiana to levy this license or privilege tax on this privilege of engaging in intrastate business in Louisiana.

Act 51 of 1934 classifies businesses according to type of business done, and value of privilege to do business in Louisiana.

The measure of the tax is the number of retail stores in Louisiana.

The type of business transacted in Louisiana and the value of the privilege to operate each retail store in Louisiana is determined by the number of retail stores under the same general management, supervision, ownership or control.

The greater the number of retail stores in a chain, the greater the many advantages accruing to the operators of the chain, and the greater the advantages accruing to each retail unit in the chain, thereby determining the type of business the retail store is engaged in, and the value of the privilege of doing business in Louisiana.

Under Act 51 of 1934, the rate of the tax alone is affected by the total number of retail stores in the chain.

The retail stores operated by appellants in Louisiana are part of a system; the state can look beyond borders to determine the true value of properties in Louisiana when all are part of a system.

The Louisiana Statute should be sustained on further ground that all appellants are foreign corporations doing intrastate business in Louisiana.

In the alternative, the Louisiana Statute, in effect, classifies chain operators in Louisiana as local, sectional and national chains.

Rate of tax fixed by number of retail units applies only to chain stores.

POINT I.

Act 51 of 1934 levies a license or privilege tax on privilege of operating retail stores in multiple form in Louisiana, clearly within authority of Louisiana Legislature.

Section 8, Article 10, of the Constitution of Louisiana for the year 1921, in part, follows:

> "License taxes may be levied on such classes of persons, associations of persons and corporations pursuing any trade, business, occupation, vocation or profession, as the Legislature may deem proper, except clerks, laborers, ministers of religion, school teachers, graduated trained nurses, those engaged in mechanical, agricultural, or horticultural pursuits or in operating saw mills. Such license taxes may be classified, graduated or progressive."

Acting under the authority vested in it by said Section and Article of the Constitution of the State, the Legislature passed Act No. 51 of 1934. The title of said Act clearly shows it was the intention of the Legislature of Louisiana to levy a license tax under the authority of said Section and Article of the Constitution. The title of said Act follows:

> "An Act to levy an annual license tax on all persons, firms, partnerships, corporations or associa-

tions of persons engaged in the business of operating two or more stores or mercantile establishments, one or more of which is located in this State, where goods, wares, merchandise, or commodities of every description whatsoever are sold or offered for sale at retail under the same general management, supervision, ownership or control, commonly known as branch or chain stores, under Section 8 of Article X of the Constitution of 1921; and providing penalties for the violation of this Act; and making an appropriation and distribution of said funds."

Section 1 of said Act states that:

"Section 1. Be it enacted by the Legislature of Louisiana, That because of the advantages accruing from the operation of multiple stores wherever situated, and because of the basic difference inherent in such character of operations, there be and is hereby levied an annual license tax for the year 1935 and for each subsequent year upon each person, firm, partnership, corporation or association of persons engaged in the business of operating or maintaining, as part of a group or chain, any store or stores in this State, where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail under the same general management, supervision, ownership or control, commonly known as branch or chain stores."

It is evident, after reading the Constitutional Provision under which the statute was enacted by the Legislature, together with the statute itself, that the Legislature of Louisiana levied an occupational, license or privilege tax on the privilege of operating retail stores in Louisiana. It is in no sense a property tax. It is levied on the right to exercise an intrastate privilege within the State of Louisiana.

POINT II.

Statute classifies businesses according to type of business done, and value of privilege to do business in Louisiana; measure of tax is number of retail stores in State; type of business transacted in Louisiana and value of privilege to do business in Louisiana determined by number of retail stores under same general management, supervision, ownership or control; greater the number of retail units in a chain, the greater the many advantages accruing to the operators of the chain, and the greater the advantages accruing to each retail unit in the chain, thereby determining the type of business the retail unit or units are engaged in, and the value of the privilege of doing business in Louisiana.

Act 51 of 1934 levies a license or privilege tax on each unit operated in Louisiana belonging to a chain system. The measure of the tax, under the statute, is the number of units operated in the State of Louisiana. The Legislature has classified the business of operating retail chain units according to the type of business done in Louisiana, and according to the value of the privilege of conducting such business. The type of business done, and the value of the privilege of operating in Louisiana, are based on the multiple advantages accruing to the operators of retail chain units, and the basic differences inherent in such operations, and the advantages behind each store operated in the chain in Louisiana.

In order to arrive at the type of business done, the value of the privilege to do business in the State of Louisiana, and to arrive at the value of the multiple advantages accruing to the operators of multiple units and to each store operated in Louisiana, and in order to arrive at the

extent of the basic differences for the purpose of classification, the Legislature of Louisiana has reached the conclusion that this classification can be made fairly, the type of business most accurately classified, and the advantages accruing to each store operated in Louisiana in the chain, by basing the rate of the tax on the entire number of units making up the chain system.

The fact that the Louisiana Legislature looks to the entire number of units in the chain in arriving at the rate of the license or privilege tax on each unit in Louisiana is merely permitting all the units to affect the rate of the license or privilege tax. It in no manner taxes property outside the State of Louisiana, as contended by appellants.

The testimony and evidence offered by appellees and appearing in the record, together with the jurisprudence established by this Court, as will be discussed hereinafter, clearly and emphatically show that, as a general proposition, the greater the number of units in a retail chain, the greater the many advantages enjoyed by the entire organization, and the greater the value of the privilege of doing business in that form, and the greater the per unit advantage behind each store.

Chains operating, for example, 100 retail units, enjoy as a general proposition, the same discounts, the same secret rebates, the same reduction in cost of transportation, the same purchasing power, the same low cost in administration, the same opportunities to establish new retail units in territories not theretofore covered, and the same opportunity to carry the new units at a loss until they are established, making up for that loss by increasing prices in other fields where monopolies or near monopolies have already been established.

Similarly, chains of 50 stores have a very definite and fixed advantage which they have in common, and which definitely marks the type of merchandising that they do. The greater the number of units in a chain, the greater the advantages, and the greater the value of the privilege of operating each unit or retail store in Louisiana.

If a national chain has one unit in Louisiana, the per unit advantages accruing to it by reason of the fact it is a part of a chain, or system is just as much behind it, and increases the value of the privilege to operate the one unit and determines the type of business it does, just as much as if all the units were located in Louisiana, if not more. For example, Walgreen, probably the largest drug chain in the United States, has recently opened its only unit in Louisiana, at Shreveport. Who would contend that this one unit at Shreveport, the only unit in Louisiana, is not a chain store? Walgreen has approximately 500 stores in its chain. The rate of tax on the Louisiana unit under the statute is fixed by the total number of units in the chain. By dividing the total amount of money reaching the treasury of this chain by reason of its size, such as discounts, allowances, less cost of operation, lower transportation costs, less advertising costs, etc., by the number of units in the chain, you have the per unit advantage created and made possible by all the units being operated as a system, and the profit per unit after said division is just as much behind the unit at Shreveport, and gives it the same advantages, if not more, as would accrue if all the units were in Louisiana. Walgreen, under the statute, would pay for only the one unit, but the rate would be determined by all the units.

No one would seriously contend that Walgreen, with one unit in Louisiana, and that at Shreveport, is doing the same type of business in Louisiana that an independent drug store operator is doing at Shreveport, with only one store. Such a contention would be absurd! Nor would anyone seriously argue that the privilege to do business in Louisiana enjoyed by Walgreen for the one unit is not worth more than the privilege enjoyed by the druggist who operates one store only. Yet, if the Louisiana statute arrived at the rate per unit, based on the number of units in the State alone, Walgreen would pay no chain store tax in Louisiana, as it operates only one unit, and yet it is a component part of one of the world's largest drug chains! Such a condition would be unfair, and cannot be taken as a fair classification.

Say, for example, a resident of Shreveport had only two drug stores, and both of them are in Louisiana. If the rate of tax was determined by the number of units in Louisiana alone, he would pay a chain store tax, and would be competing with Walgreen, who would pay no chain store tax, yet Walgreen belongs to one of the largest, if not the largest, drug chains in the United States, and the unit at Shreveport enjoys its proportionate share of the advantages created by the entire chain.

This Walgreen illustration conclusively shows the fairness of the classification of the Louisiana Statute based on the value of the privilege to do business in Louisiana, and the type of business done. The only way to accurately determine this, and to take into account the advantages actually enjoyed, is to determine the rate by the units in

the chain, as provided in the Louisiana Statute, and measure the tax by the number of units in Louisiana.

The appellants, The Great Atlantic & Pacific Tea Company, operating in excess of 15,000 units, bases its attack on Act 51 of 1934, principally on its allegation that there is no difference in the value of the privilege enjoyed by it, as compared with the H. G. Hill Stores in New Orleans.

Certainly, the allegations in the bill of complaint filed by the Great Atlantic & Pacific Tea Company, to this effect, cannot be taken seriously. There is, in fact, very little similarity in the method of operation of the Great Atlantic & Pacific Tea Company as compared with the H. G. Hill Stores. It is not necessary at this point to restate the facts disclosed by the testimony of appellees' witnesses, the documentary evidence offered by appellees, and the testimony of Mr. Parr and Mr. Gundrey, officials of the Great Atlantic & Pacific Tea Company. On secret rebates and allowances and brokerage fees alone, the Great Atlantic & Pacific Tea Company enjoys a $530.00 per unit advantage in Louisiana over those not receiving those discounts. The many other advantages shown by the record can be analyzed to show the per store advantage of the complainant.

The Court, with respect, is urged to examine the list of manufacturers appearing in the record at pages 66-99, both inclusive. It lists the names of the manufacturers giving the Great Atlantic & Pacific Tea Company secret rebates not appearing on the invoices, together with the merchandise sold it, and the type of rebate given.

In the writer's opinion, the Court will find the contents of this list very interesting as it reveals, in some respects, the power, or rather the type of operation enjoyed by the Great Atlantic & Pacific Tea Company. The Court should keep in mind that this statement and list were prepared by an official of the Great Atlantic & Pacific Tea Company.

The Great Atlantic & Pacific Tea Company in 1934 paid a dividend of $7.00 per share on Preferred Stock, and $7.00 per share on Common Stock. To pay the Common Stock dividend required $14,000,000. An amount sufficient to pay more than 50% of this dividend was received by The Great Atlantic & Pacific Tea Company in secret rebates, allowances and brokerage fees, viz., $8,105,000.00.

It was admitted by Mr. Parr that The Great Atlantic & Pacific Tea Company demands these secret rebates or advertising allowances from manufacturers, and if they are not given, the merchandise manufactured by the person refusing the secret discount or rebate, is not "pushed" by the retail units of The Great Atlantic & Pacific Tea Company, and, if possible, the goods are not stocked in its retail units. Only organizations of the size of this company can successfully pursue such a policy.

The Federal Trade Commission, in *Senate Document No. 4, 74th Congress, 1st Session*, which was the final report of the Commission to the United States Senate, at *page 85*, enumerated some of the many advantages enjoyed by the operators of chain or multiple retail units. The commission said:

> "Summarizing the facts set forth in the preceding chapters II, III, IV, and V, it may be stated that the chief advantage enjoyed by the chain store is

its lower selling prices to consumers. These lower selling prices are largely due to a variety of factors, which may be divided into two classes: First, those which appear to be amenable to ordinary governmental regulation, and, second, those which would be amenable only to extraordinary governmental measures. Among the former class may be mentioned:

1. The usually lower buying prices of chains as compared with independent wholesalers or retailers, much of which is often the result of special discounts and allowances to chains. These discounts are sometimes based upon specified quantity purchases or definite quotas of increase in purchases or to reimburse the chains for newspaper-advertising expenditures on the manufacturer's product. In other cases, however, they may masquerade as brokerage fees or advertising allowances.

2. The extensive use by the chains of large proportions of leader and loss leader merchandise sold at prices which are below the average cost of doing business plus the cost of the merchandise and which are sometimes below the latter.

3. More extensive short and less extensive overweighing by chains in some localities than by independent stores on commodities sold by weight.

"Among the second class, those factors which would be amenable only to extraordinary measures, may be mentioned:

(a) The less service given to customers by chain stores as compared with independents on the average;

(b) The indicated lower wages paid by the chains in some localities at the time of the inquiry;

(c) Elimination by the chains of most of the wholesale selling expense commonly involved in the wholesaler-retailer system of distribution;

(d) The wider profit margins on chain-store purchased and especially manufactured private-brand merchandise as compared with standard brands, which advantage may at times contribute to the ability of the chains to reduce prices through loss leaders or otherwise, particularly on standard-brand goods, private brands being seldom used as leaders;

(e) Profits from wholesaling operations in the case of a number of both the larger and smaller chains which have engaged in this kind of business, which profits may likewise contribute to the lower prices on merchandise sold through retail stores.

(f) In addition, chains in many lines possess an important advantage through their ability to use newspaper advertising where the independent retailer cannot afford to do so. Moreover, the newspaper advertising of the chains tends to be more effective than that of the independents owing to the multiple outlets of the chains in those cases where the chain has more than one store in the area which is covered by the newspaper advertising.

(g) A final and very important advantage of the chain consists in its ability to average the profit results obtained from its stores in various localities, the low prices obtained in one or more areas being offset by the higher prices obtained at one or more other points. This ability of the chain to average its prices and profits may contribute materially to its ability to use leaders and loss leaders effectively."

The many advantages accruing to operators of chain stores, as shown by the testimony and evidence offered by appellees, and as found by the Federal Trade Commission, result from the fact that there are many units or retail stores operated under the same general supervision, owner-

ship or control. Each unit or retail store is an outlet, and contributes its proportionate part to the whole system, and all units or retail stores make the many advantages of so operating possible. There is a definite and substantial advantage behind each unit or retail store capable of calculation, and the only possible way to fairly arrive at the worth of this advantage is by taking into consideration the entire number of units in the chain. In the case of The Great Atlantic & Pacific Tea Company, on one item alone, that of secret rebates and brokerage fees, each retail unit in Louisiana has a cash advantage of $530.00, almost the amount of the tax per store in Louisiana.

Louisiana has sought under the statute involved to tax a privilege purely intrastate in character. It has levied a tax on the privilege of operating a retail store or stores in the State which are a part of a chain or system. The measure of the tax is the number of retail stores operated by the chain in the State. Only the rate is determined by the number of stores in the entire chain. This Court has already held that, broadly speaking, the opportunities and power of a chain become greater with the number of the component links, and the greater they become, the more far reaching are the consequences, both social and economic. See *Fox v. Standard Oil Company of New Jersey, infra.*

The three judge court which rendered the opinion in the case at bar emphatically held, as shown by the findings of fact and conclusions of law (R. p. 263) and the opinion, that the State of Louisiana proved in the testimony and evidence it submitted that the retail units operated in

Louisiana by appellants are a part of a chain or system, and that all of the retail stores of a retail chain contribute to the central purchasing power irrespective of the location of stores, and that all of the retail stores in the chain increase the per unit multiple advantages enjoyed by each store and the operator of the system. The lower court further found that the testimony and evidence offered by the appellee conclusively showed that the greater the number of units in a chain the greater the purchasing power, the greater the secret rebates and allowances the greater the advantage in advertising, the greater the capital employed, the greater the social and economic consequences and the lower the cost of distribution and overhead.

The lower court further definitely held that the testimony and evidence offered by the State of Louisiana in the case at bar conclusively proved the difference in the type of operation between the operator of one store and the operator of many stores, and the difference in the type of operation, varying with the number of units in the chain, and further that the testimony and evidence offered by the State of Louisiana showed the difference in the method of operation in the Great Atlantic & Pacific Tea Company in Louisiana as compared with the H. G. Hill Stores. The lower court further held that the evidence and testimony offered by the State of Louisiana in the case at bar showed the contribution to the advantages made by each unit in a system of chain stores, and the per unit advantage made possible by the whole system.

Contents of Record—Indiana Case.

The testimony, documentary evidence and offerings in this case include practically the same proof found in the original chain store tax case, *State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527, 51 S. Ct. 540.* In addition, the record shows the contribution to the advantages made by each unit in the chain, and the per unit advantage made possible by the whole system.

The advantages named by the Court in the Indiana case, as establishing the difference in the type of operation between the operator of one store and the operator of many stores, and the difference in the type of operation, varying with the number of units, were quantity buying, which involves the application of the mass process to distribution, comparable to the mass method used in production; buying for cash and obtaining the advantages of cash discounts; skill in buying, so far as not to overbuy, and at the same time keep the stores stocked with production suitable in size, style and quality for the neighborhood customers who patronize them; distributing from a single warehouse to various stores; abundant supply of capital, whereby advantages may be taken of opportunities to establish new units; a pricing and sales policy different from that of the independent store owner, involving lower prices; a greater turnover and constant analysis of the turnover to ascertain profits on the varying items; uniform and, therefore, cheaper and better advantages for the entire chain in a given locality; standard forms of display for the promotion of sales, superior management and methods, concentration of management in the special lines of goods handled by the

chains; proportional accounting methods; standardization of store management, sales policy and goods sold.

This Court, in the *Indiana* case, *supra*, in discussing the right of the state to classify chains according to the number of units in the chain, said:

> "The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. Bell's Gap R. R. v. Pennsylvania, 134 U. S. 232, 10 S. Ct. 533, 33 L. Ed. 892; Southwestern Oil Co. v. Texas, 217 U. S. 114, 30 S. Ct. 496, 54 L. Ed. 688; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 30 S. Ct. 578, 54 L. Ed. 883. The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction. American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 21 S. Ct. 43, 45 L. Ed. 102, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman, 240 U. S. 342, 36 S. Ct. 370, 374, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; Quong Wing v. Kirkendall, 223 U. S. 59, 32 S. Ct. 192, 56 L. Ed. 350. As was said in Brown-Forman Co. v. Kentucky, supra, at page 573 of 217 U. S., 30 S. Ct. 578, 580:
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> "'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license

tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'

"It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives, or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the Legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the Court make this abundantly clear.

"In American Sugar Refining Co. v. Louisiana, supra, a license tax imposed upon persons and corporations carrying on the business of refining sugar and molasses, which excepted planters and farmers grinding and refining their own sugar and molasses, was held not to work an unconstitutional discrimination.

"In Cargill v. Minnesota, 180 U. S. 452, 21 S. Ct. 423, 45 L. Ed. 619, a state statute requiring the proprietors of warehouses situated on the right of way of a railroad to secure a license from a state commission, and containing no such requirement with respect to warehouses not so situated but doing exactly the same business, was held valid.

"In Armour Packing Co. v. Lacy, 200 U. S. 226, 26 S. Ct. 232, 50 L. Ed. 451, a North Carolina statute imposed an occupation tax upon every meat-packing house doing business in that state. The Armour Company which was taxed under this statute had its packing house at Kansas City and shipped its packed products to various depots in the state, where they were sold and delivered in competition with wholesalers and commission merchants were

not required to pay the tax. The statute was sustained.

"In Quong Wing v. Kirkendall, supra, a statute of Montana imposing a license fee on hand laundries was held not to constitute a denial of the equal protection of the laws because it did not apply to steam laundries, and because it exempted from its operation laundries not employing more than two women.

"In Bradley v. Richmond, 227 U. S. 477, 33 S. Ct. 318, 57 L. Ed. 603, an ordinance imposed a tax on the conduct of various businesses and gave a power of classification to a committee of the council. That committee classified private bankers, placing a tax of one amount on certain of them and of a different amount on others. It appeared that the business of those in the one class was that of lending money at high rates upon salaries and household furniture, while that done by the other class was that of lending money upon commercial securities. The classification was held not to offend the constitutional provision for equal protection of the laws.

"In Metropolis Theatre Co. v. Chicago, 228 U. S. 61, 33 S. Ct. 441, 443, 57 L. Ed. 730, an ordinance classified theatres for license fees based on and graded according to the admission charged. It was shown that some of the theatres charging a higher admission had less revenue than those charging a smaller price, and therefore paying lower license fees. This Court held the classification valid.

"In Singer Sewing Machine Co. v. Brickell, 233 U. S. 304, 34 S. Ct. 493, 497, 58 L. Ed. 974 there was drawn in question a statute of Alabama which provided that every person, firm, or corporation selling or delivering sewing machines in person or through agents should pay a tax of $50 annually for each county in which they might sell or deliver said articles, and for each wagon and team used in delivering or displaying the same an additional sum

in each county of $25 annually. It exempted merchants selling sewing machines at their regularly established places of business. The Singer Company, a foreign corporation, was engaged in many counties in the state in selling and renting sewing machines, in part from regularly established places of business and in part by means of wagons going from place to place in counties where its stores were located. It attacked the statute on the ground that it involved an arbitrary discrimination between merchants selling at their stores and merchants selling by means of wagons. It was shown that the merchants who sold at their stores usually delivered the articles sold by wagon. This Court sustained the tax, saying with respect to the two kinds of business:

> " 'But there is an evident difference, in the mode of doing business, between the local tradesman and the itinerant dealer, and we are unable to say that the distinction made between them for purposes of taxation is arbitrarily made. In such matters the states necessarily enjoy a wide range of discretion, and it would require a clear case to justify the courts in striking down a law that is uniformly applicable to all persons pursuing a given occupation on the ground that persons engaged in other occupations more or less like it ought to be similarly taxed.'

"In Rast v. Van Deman, supra, a statute placing taxes additional to the usual occupations taxes on persons who offered, with merchandise bargained or sold in the course of trade, coupons, profit-sharing certificates, or the like, was attacked as being arbitrary and unreasonable, in that the only difference between the other merchants and those who used trading stamps was a difference in the method of advertising. This Court said, however:

> " 'The difference between a business where coupons are used, even regarding their use as a

means of advertising, and a business where they are not used, is pronounced. Complainants are at pains to display it. The legislation which regards the difference is not arbitrary within the rulings of the cases. It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it. * * *'

"In Armour & Co. v. Virginia, 246 U. S. 1, 38 S. Ct. 267, 269, 62 L. Ed. 547, the statute under attack laid a tax on merchants doing business in the state based on the amount of their purchases during the license period, including as purchases all goods and merchandise manufactured by the licensee and sold or offered for sale in the State. It excluded from its operation domestic manufacturers, taxed on capital, who offered for sale at the place of manufacture goods and merchandise manufactured by them. It applied alike to citizens and residents of Virginia and non-citizens and non-residents who manufactured in Virginia. The State Supreme Court (118 Va. 242, 87 S. E. 610) held that it applied to Armour & Co., who manufactured part of their products without the state and sold them within it. This Court said:

" 'In the first place we are of opinion that the distinction upon which the classification in the statute rests between a manufacturer selling goods by him made at their place of manufacture and one engaged as a merchant in whole or in part in selling goods of his manufacture at a place of business other than where they were made is so obvious as to require nothing but a mere statement of the two classes. All question concerning the equal protection clause of the Fourteenth Amendment may therefore be put out of view.'

"In view of the numerous distinctions above pointed out between the business of a chain store

and other type of store, we cannot pronounce the classification made by the statute to be arbitrary and unreasonable. That there are differences and advantages in favor of the chain store is shown by the number of such chains established and by their astonishing growth. More and more persons, like the appellee, have found advantages in this method of merchandising and have therefore adopted it. What was said in Metropolis Theatre Co. v. Chicago, supra, is quite applicable here:

> "'* * * The distinction obtains in every large city of the country. The reason for it must therefore be substantial; and if it be so universal in the practice of the business, it would seem not unreasonable if it be adopted as the basis of governmental action.'
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> "The court below fell into the error of assuming that the distinction between the appellee's business and that of the other sorts of stores mentioned was solely one of ownership. It disregarded the differences shown by the record. They consist not merely in ownership, but in organization, management, and type of business transacted. The statute treats upon a similar basis all owners of chain stores similarly situated. In the light of what we have said, this is all that the Constitution requires. Clark v. Titusville, 184 U. S. 329, 22 S. Ct. 382, 46 L. Ed. 569; Magoun v. Illinois Tr. & Savings Bank, 170 U. S. 283, 18 S. Ct. 594, 42 L. Ed. 1037."

The Louisiana statute involved treats all similarly situated alike. This is all that is required by the equal protection clauses of the Federal and State Constitutions. *Ohio Oil Co. v. Conway, 50 Sup. Ct. 310, 281 U. S. 146.* The same rate of tax applies to all chains operating the same number of units. The record clearly shows that the number of units in a chain determines the type of business done by each unit. The Federal Trade Commission de-

termines the size of a chain by the number of units in the chain. See *Sen. Doc. 4, 74 Cong. 1st Sess., Page 16.* The per unit advantage to the chain operator is determined by the number of units in the chain.

The Great Atlantic & Pacific Tea Company alleges that the Louisiana Statute discriminates between it and the H. G. Hill stores. The Great Atlantic & Pacific Tea Company operates in the United States 14,705 retail units (R. p. 83). These units sell the same general type of merchandise (R. p. 84). These 14,705 units are located in 38 states of the union and the District of Columbia (R. p. 84). The Great Atlantic & Pacific Tea Company has retail stores in every state in the union selling the same general type of merchandise with the exception of the following: Utah, Idaho, Colorado, Wyoming, New Mexico, Montana, Nevada, South Dakota, North Dakota and Oregon (R. p. 84). The Great Atlantic & Pacific Tea Company has stores scattered almost uniformly throughout the United States (R. p. 84).

In the states surrounding Louisiana, The Great Atlantic & Pacific Tea Company has 333 stores in Texas, 33 stores in Mississippi, and 3 stores in Arkansas (R. p. 84). H. G. Hill Stores, Incorporated, owns 92 stores in Louisiana and no stores elsewhere (R. p. 211).

The Great Atlantic & Pacific Tea Company and H. G. Hill Stores, Incorporated, are differently classified by Act 51 of 1934. The Great Atlantic & Pacific Tea Company alleges in its bill of complaint that it and the Hill Stores operate business in the same manner, and that the tax levied by Act 51 of 1934, therefore, unjustly discrim-

inates against The Great Atlantic & Pacific Tea Company and in favor of the H. G. Hill Stores.

In connection with this position taken by The Great Atlantic & Pacific Tea Company, the Court, with respect, is urged to carefully consider the testimony and evidence offered by the State of Louisiana, especially the testimony of W. E. Penick (R. p. 225), wherein it is clearly shown that there is a tremendous difference in the manner and method of operation between The Great Atlantic & Pacific Tea Company and H. G. Hill Stores.

The H. G. Hill Stores do not have a sufficient number of retail units to warrant maintaining purchasing offices at the various sources of supply as does The Great Atlantic & Pacific Tea Company, nor does the purchasing power of the Hill Stores enable the operating officials to demand from manufacturers the tremendous rebates, brokerage fees and other allowances demanded and given to The Great Atlantic & Pacific Tea Company. The Great Atlantic & Pacific Tea Company engages extensively in manufacturing (R. pp. 211-218) while the H. G. Hill Stores, Incorporated, do not operate sufficient units to enable it to engage in the manufacturing of any of the products it sells through its retail units. The Great Atlantic & Pacific Tea Company enjoys a distinct advantage in cheaper advertising on a nationwide scale, while the Hill Stores, operating in a small area, are unable to enjoy this privilege (R. pp. 211-218).

These are some of the few advantages enjoyed by The Great Atlantic & Pacific Tea Company over H. G. Hill Stores, Incorporated, and are advantages created solely

and only by reason of the fact that The Great Atlantic & Pacific Tea Company operates the 14,705 retail units. Certainly it cannot be seriously contended that there is no difference in the manner and type of the operation between The Great Atlantic & Pacific Tea Company and the H. G. Hill Stores, Incorporated.

The Louisiana Statute recognizes these vast differences in the methods of doing business and the type of operation, and recognizes the difference in the value of the privilege to operate each unit in a chain in Louisiana, depending upon whether the retail store is a unit in a small or a large chain of retail units.

All chains, under the Louisiana Statute, doing the same type of business and enjoying a privilege of the same value, are taxed and treated alike. In the *Indiana* case just cited the court said the fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction.

Liggett v. Lee.

Louis K. Liggett Company v. Lee, 288 U. S. 517, 53 S. Ct. 481, was the second important case decided by this Court involving chain store taxation.

The *Liggett* case involved the levy of a tax graduated according to the number of stores in a county, but provided that if the stores in the chain were located in more than one county, the rate for each store was increased.

The majority opinion of this Court in the *Liggett* case held that the fact the stores were located in more than

one county did not affect the "value of the privilege enjoyed" and, therefore, violated the Fourteenth Amendment to the Constitution of the United States. On this point, the Court said:

> "The appellees suggest that an owner reaps greater advantage by the establishment of a new store in a county not previously occupied. This may be conceded. It is evident, however, that the mere spatial relation between the store and a county line cannot, in and of itself, affect the value of the privilege enjoyed. The appellees fail to show how the fact that the new place of business lies in another county increases the advantage over that to accrue from a location within the same county. The classification is solely of different chains, and the difference between them consists neither in number, size, surrounding population, nor in any factor having a conceivable relation to the privilege enjoyed."

The Court's attention is directed to the fact that the basis of graduating the tax on chain stores, according to the number of units, in the *Indiana* and *Florida* cases, was the fact that all the units, taken as a system, affect the value of the privilege enjoyed in operating each unit. That is precisely the basis of the classification in the Louisiana Statute herein attacked.

In the *Liggett* case, this Court, in commenting on the ruling in the *Indiana* case, said:

> "It was there held that, whatever may be said of individual similarities and differences between chain store operation and the conduct of a single shop or a department store, the former employ distinguishable methods of conducting business, and the Legislature may make the difference in method and character of the business the basis of classification for taxation."

In further discussion the *Indiana* case, the Court, in the *Liggett* case, said:

> "The decision in the Jackson Case was based, not upon any single feature of chain store management, but upon the ultimate fact of common knowledge, illustrated and emphasized by the evidence, that the conduct of a chain of stores constitutes a form and method of merchandising quite apart from that adapted to the practice of the ordinary individually operated small store or department store; and that the difference between an integrated and a voluntary chain is fundamental."

The Court, in the *Liggett* case, held that the fact that one group of stores fell into one classification, and another group into another classification, and that these stores were in competition with each other, is not sufficient ground to condemn a tax as discriminatory. In this connection, the Court said:

> "Neither similarity of opportunities and advantages in some aspects, nor the fact that the one kind of store competes with the other, is enough to condemn the discrimination in the taxes imposed."

The fact complainant competes with H. G. Hill Stores, therefore, is not enough to condemn the Louisiana Statute as alleged by complainant.

Further, the Court, in that same case, held that the difference between the classes need not be great, and that if any reasonable distinction can be found to sustain the classification and the statute, it should be held valid. The Court said:

> "It is needless to repeat what was said in the Jackson Case to the effect that the difference between

> the subjects taxed need not be great, and that, if any reasonable distinction can be found, the duty of the court is to sustain the classification embodied in the law."

Appellant, F. W. Woolworth Company, will file a brief contending that the decision in the *Liggett* case is decisive of the issues in the case at bar. This contention, we submit, is without merit.

The Florida Statute involved in the *Liggett* case provided for a graduated scale of taxes on all stores in a chain operated within a single county, but, if the same number of stores were located in more than one county, the license fee for each was materially increased. The Louisiana Statute has no such provision. It takes into account the additional advantages accruing to the operator of multiple retail stores that increase with the number of retail stores, and which can be easily calculated on a per store advantage, which advantage is enjoyed by each unit or retail store.

Under the Louisiana Statute, the rate per store in Louisiana is the same whether all the stores operated by a chain are located in one parish (county) or not. In other words, under the Florida Statute, if the corporation operated, say 10 stores in one county in that State and moved one of the 10 into another county, the rate on each store in both counties was increased by the mere moving of one of the 10 stores into another county. The chain would be then still operating 10 stores, and the only reason, under the Florida Statute, that the rate of tax was increased on each store was the fact that one of the 10 stores had been

moved across a county line. This classification, the majority of Court held in the *Liggett* case, was unreasonable and arbitrary.

Under the Louisiana Statute, if the same chain operates 10 stores in one parish (county) in Louisiana and should move one of the 10 stores into another parish (county), the rate of tax on each store, or unit, would be the same. It would be determined by the entire number of retail stores or units in the chain. Under the Louisiana Statute, the rate of tax per store is increased only by an increase in the number of retail stores under the same general supervision, management, ownership or control, the increase in the number of stores thereby increasing the multiple advantages of the chain operation, which increase in advantages is behind each store.

Under the Louisiana Statute, the increase in the rate of the tax on each store in Louisiana, where the number of stores in the chain is increased, is not an increase in the rate on each store in Louisiana because of the fact that retail stores are opened in other parishes (counties), or in other states; the Louisiana Statute merely determines the type of business done by each retail store in Louisiana, and the value of the privilege of each retail store in Louisiana to operate, by taking into account the many advantages accruing to each unit or retail store as the number of retail stores increase in the same chain. The evidence and testimony offered by appellees show, and as the lower court found, the greater the number of retail stores in a chain, the greater the multiple advantages enumerated in this brief, and the greater the per unit or per store advantage.

Fox v. Standard Oil Company of New Jersey.

The case of *Fox v. Standard Oil Company of New Jersey, 55 S. Ct. 333, 294 U. S. 87,* was the third chain store case of major importance.

The State of West Virginia levied a chain store tax. The rate of tax was determined by the number of units in the chain in the State. Filling stations were included within the definition of chain retail units. The filling stations attacked the validity of the statute on several grounds, including the fact that because they were small retailing units, and their sales were small compared with other types of retail units, that the tax was so oppressive as to amount to an arbitrary discrimination, or unlawful confiscation. The Court held otherwise and upheld the validity of the levy.

This Court, in discussing the power of the State of West Virginia to levy the tax involved, and to make the classification contained in said Statute, said:

> "When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers. The subject was fully considered in Magnano Co. v. Hamilton, 292 U. S. 40, 54 S. Ct. 599, 78, L. Ed. 1109, decided at the last term. 'Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk.' Alaska Fish Salting & By-Products Co. v. Smith, 255 U. S. 44, 48, 41 S. Ct. 219, 220, 65 L. Ed. 489, quoted in Magnano Co. v. Hamilton, supra, page 46 of 292 U. S., 54 St. Ct. 599."

This Court, in discussing the size of chains, and the effect of the increase in the number of units in the chain, said:

> "A chain, as we have seen, is a distinctive business species, with its own capacities and functions. Broadly speaking, its opportunities and powers become greater with the number of the component links; and, the greater they become, the more far-reaching are the consequences, both social and economic. For that reason the state may tax the large chains more heavily than the small ones, and upon a graduated basis, as indeed we have already held. State Board of Tax Commissioners v. Jackson, supra; Liggett Co. v. Lee, supra. Not only may it do this, but it may make the tax so heavy as to discourage multiplication of the units to an extent believed to be inordinate, and by the incidence of the burden develop other forms of industry. Quong Wing v. Kirkendall, 233 U. S. 59, 32 S. Ct. 192, 56 L. Ed. 350; American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 95, 21 S. Ct. 43, 45 L. Ed. 102; Southwestern Oil Co. v. Texas, 217 U. S. 114, 126, 30 S. Ct. 496, 54 L. Ed. 688; Sproles v. Binford, 286 U. S. 374, 394, 52 S. Ct. 581, 76 L. Ed. 1167; Stephenson v. Binford, 287 U. S. 251, 53 S. Ct. 181, 77 L. Ed. 288, 87 A. L. R. 721. In principle there is no distinction between such an exercise of power and the statute upheld in Magnano Co. v. Hamilton, supra, whereby sales of butter were fostered and the sales of oleomargarine repressed. A motive to build up through legislation the quality of men may be as creditable in the thought of some as a motive to magnify the quantity of trade. Courts do not choose between such values in adjudging legislative powers. They put the choice aside as beyond their lawful competence. 'Collateral purposes of motives of a Legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry.' Mangano Co. v. Hamil-

ton, supra, at page 44 of 292 U. S., 54 S. Ct. 599, 601; McCray v. United States, 195 U. S. 27, 56, 24 S. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561. The tax now assailed may have its roots in an erroneous conception of the ills of the body politic or of the efficacy of such a measure to bring about a cure. We have no thought in anything we have written to declare it expedient or even just, or for that matter to declare the contrary. We deal with power only."

In discussing the classification made by the West Virginia Statute, the Court said that the fact the taxpayer operated a great number of units which placed it in the classification in the upper brackets was brought about by its own expansion, and it was not the fault of the state that the taxpayer had seen fit to increase the number of retail units in its chain. In this connection, the Court said:

"The argument against the statute rings the changes upon a comparison between the position of the gasoline chains and that of chains for other products. The gasoline chains, as already noted in this opinion, have units more numerous by far than those that deal in other things, and because of their size must pay a large percentage of the tax, though it is not to be forgotten that there are general commodity chains also within the upper brackets. The outcome is no evidence of an arbitrary discrimination, defiant of the restraints of law. All members of a class within the same graduated levels are treated impartially and subjected to an equal rule. Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 293, 296, 18 S. Ct. 594, 42 L. Ed. 1037. If only one form of chain chooses so to multiply its units, after arriving at the topmost levels, as to make the burden heavy, it owes its position on the scale and the aggravation of the tax to the exigencies of business and not to those of law. The classification is

not arbitrary, but in its normal operation has a rational relation to the subject-matter to be taxed, the capacity to pay, and the justice of the payment. Cf. Magoun v. Illinois Trust & Savings Bank, supra; Knowlton v. Moore, 178 U. S. 41, 54, 20 S. Ct. 747, 44 L. Ed. 969; Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369; Ann. Cas. 1912C, 160; Lake Shore & Michigan Southern R. Co. v. Clough, 242 U. S. 375, 385, 37 S. Ct. 144, 61 L. Ed. 374; Maxwell v. Bugbee, 250 U. S. 525, 540, 541, 40 S. Ct. 2, 63 L. Ed. 1124; Watson v. State Comptroller, 254 U. S. 122, 124, 41 S. Ct. 43, 65 L. Ed. 170; State Board of Tax Commissioners v. Jackson, supra, at page 537 of 283 U. S., 51 S. Ct. 540."

This Court further said that in levying taxes, the Legislature is not required to determine whether or not the placing of taxpayers in certain brackets would mean the difference betwen a profit and a loss, and that the governing body does not have to inquire to see if the taxpayer can pay the tax without sacrifice of profits. The language of the Court follows:

"We have never yet held that government in levying a graduated tax upon all the members of a class must satisfy itself by inquiry that every group within the class will be able to pay the tax without the sacrifice of profits. The operation of a general rule will seldom be the same for every one. If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict."

Appellants argue the statute involved is especially arbitrary because it does not take into account the remoteness of the units in a chain and the differences in value of different units. It has never been required that

the legislature in classifying must do so with such mathematical precision that the effect of the law will be felt equally by all whom it affects. See *Magoun v. Illinois Trust & Sav. Bank, 197 U. S. 283, 293, 296, 42 L. ed. 1037, 1042, 1043, 18 S. Ct. 594.*

Appellants argue that the Louisiana statute does not represent any policy to protect, was not designed to, and does not in fact, protect independent merchants against chains, but establishes an arbitrary discrimination against chains operating in other states.

This conclusion is not well founded for the act classifies chain stores in accordance with the economic advantages which they possess and gives recognition to the basic differences of their operations. The act itself in Section #1 specifically recites this. The Louisiana Legislature obviously had the right to make the classification in the fashion set forth in the act.

This Court, in the case of *Veazie Bank v. Fenno, 8 Wall. 533, 548, 19 L. ed. 482,* held that the Courts are without authority to prescribe limitations upon the exercise of acknowledged powers of the legislative departments. The power to tax may be exercised oppressively upon persons. The responsibility of the legislature is not to the courts but to the people by whom its members are elected. In other words, the legislature is the sole arbiter of the Destinies of its people within constitutional limits. Moreover, it has been repeatedly held:

> "Even if the tax should destroy a business, it would not be made invalid or require compensation upon

that ground alone. Those who enter upon a business take that risk." *Alaska Fish Salting & By Products Co. v. Smith, 255 U. S. 44, 48, 65 L. ed. 489, 495, 41 S. Ct. 219.*

Appellants further argue that a corporation may actually decrease its operations in Louisiana and yet be required to pay increased taxes to Louisiana because of what it does outside Louisiana. As a matter of fact, no injustice is done in the case of where a corporation decreases its operations in Louisiana and yet may be required to pay increased taxes in Louisiana because of what it does outside of Louisiana, this for the reason that the Louisiana units, being integral parts of the national chain, are commensurately benefited by the addition of more units to the chain.

No one questions the constitutional right of the State of Louisiana to tax the privilege of operating retail units in multiple form in Louisiana.

Act 51 of 1934 taxes a thing that the State of Louisiana has a right to tax. The levy, therefore, is valid. The authorities herein cited, when considered in connection with the testimony, documentary evidence and offerings of appellees, clearly show the Legislature of Louisiana has properly and validly classified the business of operating chains within the borders of the State of Louisiana.

The next point urged by appellants is the method used by the Legislature of Louisiana in arriving at the rate of the tax per unit in Louisiana. In this connection, the following authorities are submitted which show the

rate used by the Legislature in Act 51 of 1934 is constitutional, and in no way is violative of the provisions of either the Constitution of the United States or the Constitution of Louisiana.

POINT III.

Under Act 51 of 1934 rate of tax alone affected by total retail stores in chain; Maxwell v. Bugbee, 40 S. Ct. 2, 250 U. S. 525.

This Louisiana Statute levies a license or privilege tax for the privilege of doing business in Louisiana. The measure is the number of stores in Louisiana. Only the rate is determined by the number of stores in the entire chain. No property outside of Louisiana is taxed under the Statute. The rate only is affected by units of the chain outside of Louisiana, and these units are considered only for the purpose of determining the type of business done in Louisiana, and the value of the privilege of operating each unit in Louisiana.

Maxwell v. Bugbee.

The case of *Maxwell v. Bugbee, 40 S. Ct. 2, 250 U. S. 525*, involved a New Jersey inheritance tax law which levied a tax upon the transfer of property in New Jersey, to be paid upon turning said property over to an administrator or executor at the domicile of the decedent.

This New Jersey statute was attacked as being violative of the Constitution of the United States on the ground that it, in effect, taxed property beyond the jurisdiction of the State of New Jersey.

The following quotation taken from the case of *Maxwell v. Bugbee, supra*, shows the nature of the tax, the method of arriving at the amount due by the estate involved in the *Bugbee* case, and its relevancy to the case at bar:

> "Before taking up these objections it is necessary to briefly consider the nature of the tax. In Carr v. Edwards, 84 N. J. Law, 667, 87 Atl. 132, it was held by the New Jersey Court of Errors and Appeals to be a tax upon the special right, the creation of the statute, of an executor or administrator of a nonresident decedent to succeed to property having its situs in New Jersey. Of Section 12, as it stood in the original act of 1909, the court said:
>
> > " 'That section contains nothing to indicate that it is not the succession of the New Jersey representative that is meant to be taxed. It is true that the tax is not necessarily 5 per cent. upon the whole New Jersey succession. The amount depends on the ratio of the New Jersey property to the entire estate wherever situated. This, however, merely affords a measure of the tax imposed; the tax is still by the very words of the section imposed upon the property located within this state. * * *."
>
> * * * * * *
>
> "(2) It is next contended that the effect of including the property beyond the jurisdiction of the state in measuring the tax amounts to a deprivation of property without due process of law because it in effect taxes property beyond the jurisdiction of the state.
>
> "It is not to be disputed that, consistently with the federal Constitution, a state may not tax property beyond its territorial jurisdiction; but the subject-matter here regulated is a privilege to succeed to property which is within the jurisdiction of the state. When the state levies taxes within its

authority, property not in itself taxable by the state may be used as a measure of the tax imposed. This principle has been frequently declared by decisions of this court. The previous cases were reviewed and the doctrine applied in Kansas City R. R. Co. v. Kansas, 240 U. S. 227, 232, 36 Sup. Ct. 261, 60 L. Ed. 617. After deciding that the privilege tax, there involved, did not impose a burden upon interstate commerce, this court held that it was not in substance and effect a tax upon property beyond the state's jurisdiction, although a large amount of the property which was referred to as a measure of the assessment, was situated outside of the state. In the present case the state imposes a privilege tax, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent. That it may do so, within limitations which do not really make the tax one upon property beyond its jurisdiction, the decisions to which we have referred clearly established. The transfer of certain property within the state is taxed by a rule which considers the entire estate in arriving at the amount of the tax. It is in no just sense a tax upon the foreign property, real or personal. It is only in instances where the state exceeds its authority in imposing a tax upon a subject-matter within its jurisdiction in such a way as to really amount to taxing that which is beyond its authority, that such exercise of power by the state is held void. In cases of that character the attempted taxation must fail. Looney v. Attorney General, 245 U. S. 178, 38 Sup. Ct. 85, 62 L. Ed. 230; International Paper Co. v. Massachusetts, 246 U. S. 135, 38 Sup. Ct. 292, 62 L. Ed. 624, Ann. Cas. 1918C, 617. To say that to apply a different rule regulating succession to resident and non-resident decedents is to levy a tax upon foreign estates, is to distort the statute from its purpose to tax the

privilege, which the statute has created, into a property tax, and is unwarranted by any purpose or effect of the enactment, as we view it."

Application of New Jersey Statute.

In the *Bugbee* case, the decedent was a nonresident of New Jersey, leaving property both in New Jersey and in other states. He left property running into millions of dollars, but for the purpose of illustration, the following calculation shows the method of arriving at the amount of the tax due under said New Jersey statute, and its application to the case at bar. The Court in the *Bugbee* case, said:

"Following the statute, the tax was first ascertained on the entire estate as if it was the estate of a resident of the State of New Jersey with all of the decedent's property, both real and personal, located there; the tax was apportioned and assessed in the proportion that the taxable New Jersey estate bore to the entire estate."

Assume, for the purpose of argument, that Louisiana has a statute similar to New Jersey statute involved in the *Bugbee* case, and that the Louisiana statute provided that the same method named in the New Jersey statute should be used in determining the amount of tax due the State of Louisiana, that is, if the estate is less than $1,000.00, the tax should be 1%; if the estate is less than $5,000.00 and more than $1,000.00, the rate of tax is 2%, and if the estate is over $5,000.00, the rate is 3%.

Assume, then, that a nonresident of Louisiana dies leaving $1,000.00 worth of property in Louisiana and $9,000.00 worth of property outside of Louisiana, making the total estate worth $10,000.00.

Under the New Jersey statute, the property in Louisiana and the property outside of Louisiana would be added to make a total estate of $10,000.00. This places the estate in the bracket for which a 3% tax is provided, whereas if only the property in Louisiana was considered, the rate would be 1%.

Three per cent of the $10,000.00 would, of course, amount to $300.00, which is the amount of tax based on the whole estate, including property within and property without Louisiana. The amount of tax due Louisiana would be the proportion that the taxable Louisiana estate bears to the entire estate which, of course, would be 10% of the entire estate.

Then taking 10% of the $300.00, the amount of tax due on the property in Louisiana is $30.00. Whereas, if only the Louisiana property was considered, the rate would be 1%, and the tax $10.00.

Obviously, therefore, the only thing the property outside of New Jersey in the *Bugbee* case, and the property outside of Louisiana in the hypothetical case, did to the tax was to affect the rate and, therefore, increase the tax.

Frick v. Pennsylvania.

Following the *Bugbee* decision, the case of *Frick v. Commonwealth of Pennsylvania, 268 U. S. 473, 45 S. Ct. 603*, was decided by this Court.

The *Frick* case, *supra*, involved a tax on the estate of a resident of Pennsylvania who died leaving a large

amount of property. Besides real and personal property in Pennsylvania, the estate included tangible personal property having a situs in Massachusetts.

The Pennsylvania statute involved in the *Frick* case, *supra*, provided that where a person domiciled in that state died seized or possessed of property, real or personal, a tax shall be laid on the transfer of the property from him by will or intestacy laws, whether the property be in that state or elsewhere.

The method of arriving at the amount of tax due under the Pennsylvania statute was by adding the value of all the property left by decedent, whether it be within or without the state, and taking a percentage of same. The property outside the state did not affect the rate, as it did in the *Bugbee* case, but was treated as if it was within the State of Pennsylvania. The value of that property without the state was simply added to the value of the property within the State of Pennsylvania, and the tax arrived at by a set percentage of the entire value.

This Court held that by including the value of the property outside of Pennsylvania, which had acquired a situs outside of the State, was, in effect, taxing property without the jurisdiction of the State of Pennsylvania.

The Court in discussing the case of *Maxwell v. Bugbee, supra*, which was urged in the defense of the Pennsylvania statute, said that the New Jersey Statute and the

Pennsylvania Statute were different; that in the *New Jersey* case, that the only thing the property outside of New Jersey did was to affect the rate of the tax. In discussing the *Bugbee* case in this connection, the Court said:

> "The state court cited in support of its view Maxwell v. Bugbee, 250 U. S. 525, 539, 40 S. Ct. 2, 63 L. Ed. 1124. The case is on the border line, as is evidenced by the dissent of four members of the court. But it does not go so far as its citation by the state court suggests. The tax there in question was one imposed by New Jersey on the transfer of stock in a corporation of that state. The stock was part of the estate of a decedent who had resided elsewhere. The state statute, described according to its essence, provided for a tax graduated in rate according to the value of the entire estate, and required that where the estate was partly within and partly without the state the transfer of the part within should bear a proportionate part of what according to the graduated rate would be the tax on the whole. The only bearing which the property without the state had on the tax imposed in respect of the property within was that it affected the rate of the tax. Thus, if the entire estate had a value which put it within the class for which the rate was three per cent. that rate was to be applied to the value of the property within the state in computing the tax on its transfer, although its value separately taken would put it within the class for which the rate was 2 per cent. There was no attempt, as here, to compute the tax in respect of the part within the state on the value of the whole."

Maxwell v. Bugbee Not Overruled.

Appellants, in the lower Court, took the position, and will probably urge to this Court, that the case of *Maxwell v. Bugbee, supra*, was overruled by this Court when it

overruled the case of *Blackstone v. Miller, 188 U. S. 189*, upon which authority, counsel argued, the ruling in the *Bugbee* case rested. Counsel is in error in this respect for the reason that that part of the opinion in the *Bugbee* case involving the rate of the tax, was based on the case of *Kansas City R. R. Co. v. Kansas, 240 U. S. 227, 232, 36 S. Ct. 261, 60 L. Ed. 617*, and was not based on the case of *Blackstone v. Miller, supra*, as indicated by counsel.

It is true that in the case of *Farmers' Loan & Trust Company v. Minnesota, 280 U. S. 204*, this Court definitely overruled *Blackstone v. Miller, supra.* The case of *Blackstone v. Miller*, however, did not involve the question in the *Bugbee* case, which is pertinent to the issues in the case at bar. The point overruled in the *Bugbee* case by the overruling of *Blackstone v. Miller*, was the question involving the privilege which was subject to the tax, and not the method of arriving at the rate.

A careful reading of these decisions conclusively shows that *Maxwell v. Bugbee, supra*, insofar as that portion of the decision that is pertinent here, which was based on the case of *Kansas City R. R. Co. v. Kansas, supra*, is still in force and effect and is still the law. The writer is supported in this view by the author of an article in the Yale Law Journal, Volume XLIV, No. 4, February 1935, page 634, and by the author of an article in the Harvard Law Review, Volume XLIX, No. 5, March, 1936, page 756. Both these articles are based on the Louisiana Statute herein attacked.

POINT IV.

Retail stores operated by appellants in Louisiana are part of a system; State can look beyond borders to determine true value of properties within the State when all are part of a system.

The retail units operated in Louisiana by appellants are part of a chain or system; the units outside of Louisiana forming part of the system or chain contribute to the value of the privilege of doing business in Louisiana, and determine the type of business done in Louisiana. There is a per store advantage behind each unit in Louisiana, created by the entire chain.

Each unit contributes to the central purchasing power and increases the per unit multiple advantages enjoyed by the operator of the system. The greater the number of units in the chain, the greater the ramifications, the greater the purchasing power, the greater the secret rebates and allowances, the greater the advantages in advertising, the lower the cost of distribution, the lower the cost of overhead, the greater the capital employed, the greater the effect socially and economically speaking, and the greater the many other advantages accruing to chain operations, as shown by the testimony and evidence in the case at bar.

Each unit in a chain operated in a large area, including many states, contributes to the advantages enumerated above, and these advantages are enjoyed by each unit, and the total number of units define the type of business done by each unit and increases the value of the privilege of doing that type of business in the State.

It is settled jurisprudence that a state can look beyond its borders for the purpose of assessing tangible property within its confines for the purpose of getting the true value of the properties within its borders when that thing or property is a part of a system or organization of wide extent, and when the property outside adds to the value of the property within the state.

Act 51 of 1934, however, does not look to the value of any property outside the State of Louisiana, but merely includes in the method of arriving at the rate of tax due on each unit in Louisiana, the number of units in the chain, some of them possibly outside the state.

This Court, in the case of *Wallace, et al., v. Hines, 253 U. S. 66, 40 S. Ct. 435*, in discussing the method of taxing railroads that pass through several states, said:

> "The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess."

Volume 61 of Corpus Juris, page 694, in discussing this same subject, states:

> "Where a particular property is part of the railroad system, and has its actual use only a connection with such system, that fact may be considered even though other parts of the system are outside of the state; Southern Railway Company vs. Commonwealth of Kentucky, 47 S. Ct. 542, 274 U. S. 76, 71 L. Ed. 934."

This Court, in the case of *Union Tank Line v. Wright, 39 S. Ct. 276*, said:

> "Nor is the state obliged to ignore the special value that rolling stock has because of its organic relation to, and its customary use in connection with, the railroad tracks upon which it runs. Although the equipment be held in separate ownership, it may be regarded in fact as an appurtenance of the railroad and valued in that relation. It is admitted that the revenue derived by plaintiff in error from the use of its cars is in part paid by the railroad companies and proportioned to the mileage covered by the run of the cars."

In that same case, the Court further said:

> "While the valuation must be just it need not be limited to mere worth of the articles considered separately but may include as well 'the intangible value due to what we have called the organic relation of the property in the state to the whole system.' How to appraise them fairly when the tangibles constitute part of a going concern operating in many states often presents grave difficulties; and absolute accuracy is generally impossible. We have accordingly sustained methods of appraisement producing results approximately correct—for example, the mileage basis in case of telegraph company (W. U. Tel. Co. v. Massachusetts) and the average amount of property habitually brought in and carried out by a car company (American Refrigerator Transit Co. v. Hall)."

In the case of *Western Union Telegraph Company v. Taggart, 16 Supreme Court, 1054*, the Court said:

> " 'It is not to be assumed that a state contemplates the taxation of any property outside its territorial limits, or that its statues are intended to operate otherwise than upon persons and property within

the state. It is not necessary that every section of a tax act should in terms declare the scope of its territorial operation. Before any statute will be held to intend to reach outside property, the language expressing such intention must be clear. 154 U. S. 428, 14 Sup. Ct. 1114.' "

" 'Nevertheless, it is ordinarily true that when a railroad consists of a single, continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this court several times as eminently fair." 154 U. S. 430, 431, 14 Sup. Ct. 1114.

"In support of the last statement were cited State Railroad Tax Cases, 92 U. S. 608 611; Delaware Railroad Tax Case, 18 Wall. 206; Erie Railway v. Pennsylvania, 21 Wall. 492; W. U. Tel. Co. v. Attorney General of Massachusetts, 125 U. S. 530, 8 Sup. Ct. 961; Pullman's Palace-Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876; Maine v. Grand Trunk Railway Co., 142 U. S. 217, 12 Sup. Ct. 121, 163; Railroad Co. v. Gibbes, 142 U. S. 386, 12 Sup. Ct. 255; Railway Co. v. Wright, 151 U. S. 470, 14 Sup. Ct. 396.' "

" 'Take the case of a railroad running from Columbus, Ohio, to Indianapolis, Indiana. Whatever of value there may be resulting from the continuous operation of that road is partly attributable to the portion of the road in Indiana, and partly to that in Ohio; and each state has an equal right to reach after a just proportion of that value, and subject it to its taxing processes. The question is, how can equity be secured between the states? and to that a division of the value of the entire property upon the mileage basis is the legitimate answer. Taking a mileage share of that in Indiana is not taxing prop-

erty outside of the state. 154 U. S. 444, 445, 14 Sup. Ct. 1114.'"

In the case of *Fargo v. Hart, 24 S. Ct. 498*, the Court said:

"The general principles to be applied are settled. A state cannot tax the privilege of carrying on commerce among the states. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other hand, it can tax property permanently within its jurisdiction although belonging to persons domiciled elsewhere and used in commerce among the states. And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the state in taxing, even though the other parts of the system are outside of the state."

Franchise Tax on Domestic Corporations, Measured by Its Entire Property Even Though Some Located Outside the State, Valid.

In the case of *Educational Films Corporation v. Ward, 51 S. Ct. 172*, in sustaining a franchise tax on domestic corporations, measured by the entire income, whether the income be within or without the State, the Court said:

"A state may not tax tangible property located beyond its boundaries, Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493; but it may measure a tax on franchises of domestic corporations by corporate property, even though without the State. Kansas City, Ft. S. & M. R. Co. v. Botkin, 240 U. S. 227, 36 S. Ct. 261, 60 L. Ed. 617; Cream of Wheat Co. v. Grand Forks County, 253 U. S. 325, 40 S. Ct. 558, 64 L. Ed. 931. So well settled is this last-mentioned application of the doctrine that an excise

may be measured by tax immune property, that an appeal in which such a tax was assailed on the very ground urged here, was dismissed per curiam during the present term. No. 108, Nebraska ex rel. Beatrice Creamery Co. v. Marsh, 282 U. S. 799, 51 S. Ct. 38."

In the case of *Flint v. Stone Tracy Company, 31 S. Ct. 354*, this Court said:

"It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is nontaxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part, at least, property which, as such, could not be directly taxed. See, in this connection, Main v. Grand Trunk R. Co., 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163, as interpreted in Galveston H. & S. A. R. Co. v. Texas, 210 U. S. 217, 226, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638."

This Court, in the case of *Baltic Mining Co. v. Mass., 58 L. Ed. 127*, said that if a tax is levied on a legitimate subject of taxation, the fact it is measured by property or receipts from property not in themselves taxable does not invalidate the levy. The language of the Court follows:

"The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself

lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the State. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the state's jurisdiction, for the property itself is not taxed. Insofar as it is represented in the authorized capital stock, it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable."

Certainly the Louisiana statute in question is levied on a legitimate subject of taxation—the privilege of doing business in Louisiana. Even the measure of the tax under the statute is the number of units in the chain in Louisiana. This makes it a much stronger case than the facts in the *Baltic Mining Company* decision. It is only the rate that is affected by all the units in the chain. See also the case of *Kansas City F. S. & M. R. Co. v. Botkin, 60 L. Ed. 617, 36 S. Ct. 261, 240 U. S. 227*, where the Court said:

"The Court held that the tax in question was simply a tax on the privilege of being a corporation—that the authority of the state to tax this privilege, or franchise, has always been recognized, and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the state's taxing power."

Similarly, this Court has upheld income taxes levied on citizens of the State, measured by the entire income of the citizen, irrespective of where it was earned. See *Lawrence, et al., v. State Tax Commission of State of Mississippi, 52 S. Ct. 556, 286 U. S. 276.*

POINT V.

Louisiana Statute should be sustained on further ground that all appellants are foreign corporations doing intrastate business in Louisiana.

The appellants in the case at bar are foreign corporations doing intrastate business in Louisiana. This suit is brought by the appellants as a class suit, for the benefit of all corporations similarly situated.

The appellants can succeed only if the discrimination is unconstitutional as applied to them; that is, as applied to corporations. One who would strike down a statute must show that he is not only affected by it, but that as applied to him it exceeds the power of the State. *Albany County v. Stanley, 105 U. S. 305, 314, 26 L. Ed. 1044.*

The Federal Constitution does not confer upon either domestic or foreign corporations the right to engage in intrastate commerce in Louisiana. The privilege of engaging in such commerce in corporate form is one which the state may confer or withhold as it sees fit. *Railway Express Agency v. Virginia, 282 U. S. 440, 51 S. Ct. 201, 75 L. Ed. 450.* Louisiana has the right to extend the privilege to one set of persons and deny it to others. The state has the right to grant it to some type of businesses and deny it to others; it might grant the privilege to corporations with small capital, while denying it to those whose capital and resources are large. Whether the corporate privilege should be granted or withheld is a matter of state policy and rests with the Legislature.

If the Louisiana statute herein attacked had stated in terms that the excise license or privilege tax was exacted as compensation for the privilege of conducting multiple stores in corporate form in Louisiana, no corporation could successfully challenge its validity. *Horn Silver Mining Co. v. N. Y., 143 U. S. 305, 12 S. Ct. 403, 36 L. Ed. 164; Kansas City Ft. S. M. R. Co. v. Botkin, 240 U. S. 227, 36 St. Ct. 261.* And since the state had the power to do so, the mere failure to state that such was the nature of the license tax does not render it invalid. *Costillo v. McConnico, 168 U. S. 674, 683, 18 S. Ct. 229, 42 L. Ed. 622.*

If Louisiana believes that adequate protection against harm apprehended or experienced can be secured without revoking the corporate privilege, by imposing upon corporations the handicap of higher, discriminatory license fees as compensation for the privilege, there is nothing in the 14th Amendment to prevent it from so doing.

A thorough discussion of this additional ground and reason why the Louisiana Statute should be sustained will be found in the dissenting opinion of Justice Brandeis in the case of *Liggett Co. v. Lee, 288 U. S. 517, 53 S. Ct. 481.* It is evident that this point was not urged in the *Liggett* case, which involved the Florida Chain Store Tax Statute, either in oral argument or in brief. Justice Stone and Justice Cardozo so stated, and reserved the right to pass on this point when properly presented to the Court. It is, with respect, here urged.

In line with the reasoning of Justice Brandeis, as found in his opinion referred to, there is given below a

statement showing the appellants in the case at bar, together with the number of stores operated by them. Seven of the seventeen appellants in this suit are listed among the 200 largest non-banking corporations in the United States, referred to by Justice Brandeis. (See *"Modern Corporations and Private Property"* by Berle & Means, Page 19.) The assets of each of these seven corporations are also given in the following statement:

No. of Stores		Assets
14,705	The Great Atlantic & Pacific Tea Company	$147,335,000
436	Sears, Roebuck & Company	251,800,000
232	Wohl Shoe Company	
217	Consolidated Millinery Company	
465	W. T. Grant Company	
135	Scott-Burr Stores	
1,474	J. C. Penney Company	
2,634	F. W. Woolworth Company	165,400,000
352	J. J. Newberry Company	
131	H. L. Green Company	
452	Liggett Drug Company, Incorporated	
491	Montgomery, Ward & Company	187,500,000
330	G. R. Kinney Company, Incorporated	
570	Firestone Tire & Rubber Company	161,600,000
348	Goodyear Tire & Rubber Company	243,200,000
572	Melville Shoe Corporation	
*	General Electric Company	515,700,000
Total 23,544		Total $1,672,535,000

*Total number of retail not shown in the record.

POINT VI.

In the alternative, Louisiana Statute, in effect, classifies chain operators in Louisiana as local, sectional and national chains.

The position of the State in the foregoing part of this brief is here re-urged but, in the event the Court should not agree with the position of the State, and the authorities cited in support of its contention, then in the alternative, and in the alternative only, we submit that the Louisiana Statute, in effect, classifies chains operating in Louisiana into local, sectional and national chains. There is no question but what the Legislature of Louisiana has the right to make this classification for the purpose of taxation.

Justice Cardozo, at *page 502*, in the case of *Louis K. Liggett v. Lee, supra*, said:

> "Students of the chains have accepted the classification of the Census Bureau, which divides them into three groups: Local, sectional, and national. Census of 1930, Report on Retail Distribution by Chains; Lebhar, 'The Chain Store,' p. 20. Chains are local 'if substantially all their stores are located in and around some one city.' In 1930, the number of these was 5,589. They are sectional if their 'stores are located in some one section of the country, such as the New England states or the Pacific Coast states or in the Gulf Southwest or any other geographic division.' Of these there were 1,136. They are national if their 'interests are broader than those of any one section of the country.' Of these there were 321.
>
> "Statistics thus indicate that there is a definite line of cleavage between chains that serve customers

> within a single territorial unit and those framed for larger ends. The business that keeps at home affects the social organism in ways that differ widely from those typical of a business that goes out into the world. It affects the social organism, but also it affects itself. With the lengthening of the chain there are new fields to be exploited. The door is opened to opportunities that have hereto been closed."

Justice Roberts, in the case of *Louis K. Liggett v. Lee, supra*, in discussing the Florida Statute involved in that case, clearly indicated that if the Florida Statute had drawn a distinction between national and local chains, the classification would have been valid. In that opinion, he said:

> "It cannot justifiably be said that the section draws a distinction between national and local chains. The operation of the statute forbids any such assumption; for, if a national chain keeps multiple units within a single county, the tax on each is at the lower rate, while, if a so-called local chain has one store in a given county and another just over the county line, both places of business take the higher rate. This difference in treatment has no discernible relation to the sort of chain which establishes a store across a county line. The act is not a rough and ready but honest effort to differentiate what the Federal Census Bureau for its purpose denominates local chains on the one hand and what the Bureau terms sectional or national chains on the other. Neither the phraseology nor the method of operation of the act is consistent with an attempt at any such classification."

For this further reason, the Louisiana Statute should be sustained.

POINT VII.

Rate of tax fixed by number of retail units applies only to chain stores.

Counsel for appellants argued in the lower court that if the Louisiana Statute is held not to violate the Louisiana and Federal Constitutions, different types of taxes, named in the brief and in oral argument, could be levied affecting other businesses. This assumption is entirely beside the point because this Court has already held that there is sufficient difference in the methods of operation used by chains to justify classification according to the number of stores. Whether this same classification would be held valid for other types of business, in the writer's opinion, is immaterial insofar as the present case is concerned.

Chains Continue to Expand in Louisiana.

Appellants argue that wealth in Louisiana is less than in some areas where chains operate and that, therefore, the Louisiana units do not contribute as much to the system of units as a whole as do some of the other units. This may be true, but the chains continue to expand in Louisiana. They evidently are satisfied with returns in Louisiana. The Great Atlantic & Pacific Tea Company increased its number of units in Louisiana during its last fiscal year a fraction more than nine per cent.

The chain operators in Louisiana should be satisfied with their operations in Louisiana. According to the Fifteenth Census of the United States, Document No.

R-129, issued by the Bureau of the Census, page 6, there are 940 retail stores in Shreveport; 697 of them are owned by single store independents, and 239 are operated by chains. In other words, 25% of the stores in Shreveport are chain stores. The chains do 33.4% of the business done in Shreveport. (1930).

In Baton Rouge 22% of the retail stores are operated by chains, and they do 35.8% of the business.

POINT VIII.

Robinson-Patman Act.

The writer has not had an opportunity to examine the principal brief to be filed in this Court by appellants. It is necessary, therefore, to anticipate, to some extent, the argument to be urged by appellants.

In the event appellants urge that the Robinson-Patman Act of June 19, 1936, Public 692, Amending Section 2 of the Clayton Act *(U. S. C. Title 15, Section 13)*, and in that event only, appellees show that said Act has no bearing whatever on the case at bar, except to show that the method of arriving at the rate of tax contained in the Louisiana Statute is reasonable and valid, and that the classification of the business done by the operators of a store or stores in Louisiana that constitute part of a chain or system is justifiable and reasonable.

In the first place, the Robinson-Patman Act did not become a law until June 19, 1936, which was long after the passage of the Louisiana Statute, and became a law after the suit at bar was tried and submitted in the lower

court. The appellants may not now change the theory of their case in this Court. *Virginia R. Co. v. Mullins, 271 U. S. 220, 70 L. ed. 915, Virtue v. Creamery Package Mfg. Co., 227 U. S. 8, 57 L. ed. 393, Thomas v. Taylor, 224 U. S. 73, 56 L. ed. 673.*

The application of appellants for an injunction in the case at bar must be viewed in the light of circumstances existing when it was brought. *First National Bank v. Flershen, 78 L. ed. 465, Busch v. Jones, 46 L. ed. 707.*

A reading of the Robinson-Patman Act will disclose that this Act does not eliminate the advantages possessed by large chains, which advantages are behind each unit in the chain. In the first place, the Robinson-Patman Act only applies to persons engaged in commerce between the states. Furthermore, the law does not strike with illegality quantity discounts but refers merely to discriminatory discounts. That Law specifically provides that:

> "nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

POINT IX.

The opinion of the district court of three judges should be affirmed.

The personnel of the three judge district court hearing this cause was Hon. Rufus E. Foster, Judge of the United States Circuit Court of Appeals, Fifth Circuit, Hon. Joseph C. Hutcheson, Jr., Judge of the United States

Circuit Court of Appeals, Fifth Circuit, and Hon. Wayne G. Borah, Judge of the United States District Court for the Eastern District of Louisiana. With two judges of the United States Circuit Court of Appeals participating in this case, the decision is equivalent to one rendered by the United States District Court for the Eastern District of Louisiana, and affirmed by the United States Circuit Court of Appeals, Fifth Circuit.

In view of the evidence and testimony in this case offered by appellees, and for the reasons set forth in this brief, we, with respect, submit Act 51 of 1934 is violative of neither the Constitution of the United States nor the Constitution of the State of Louisiana, and that it should be so decreed; that the opinion of the district court of three judges should be affirmed.

Respectfully submitted,

GASTON L. PORTERIE,
Attorney General of Louisiana;

J. C. DASPIT,
Assistant Attorney General;

F. A. BLANCHE,
Assistant Attorney General;

E. LELAND RICHARDSON,
Assistant Attorney General.

STATE OF LOUISIANA

THE CHAIN STORE LAW

ACT No. 19 OF 1932 AS AMENDED
BY ACT No. 51 OF 1934

Issued by
SUPERVISOR OF PUBLIC ACCOUNTS
Baton Rouge, La.

ACT No. 19 OF 1932 AS AMENDED BY ACT No. 51 OF 1934.

House Bill No. 137. By Messrs. Wimberly, Madison, Bradford and Calhoun.

AN ACT

An Act to levy an annual license tax on all persons, firms, partnerships, corporations or associations of persons engaged in the business of operating two or more stores or mercantile establishments, one or more of which is located in this State, where goods, wares, merchandise, or commodities of every description whatsoever are sold or offered for sale at retail under the same general management, supervision, ownership or control, commonly known as branch or chain stores, under Section 8 of Article X of the Constitution of 1921; and providing penalties for the violation of this Act; and making an appropriation and distribution of said funds. Title amended.

Section 1. Be it enacted by the Legislature of Louisiana, That because of the advantages accruing from the operation of multiple stores wherever situated, and because of the basic difference inherent in such character of operations, there be and is hereby levied an annual license tax for the year 1935 and for each subsequent year upon each person, firm, partnership, corporation or association of persons engaged in the business of operating, or maintaining, as part of a group or chain, any store or stores in this State, where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail under the same general management, supervision, ownership or control, commonly known as branch or chain stores. Levying annual license tax on chain stores.

Sworn reports to be filed with Supervisor of Public Accounts.

Section 2. That every person, firm, partnership, corporation or association of persons engaged in the business described in Section 1 of this Act and doing business in this State shall, on or before the first day of February of each year, render to the Supervisor of Public Accounts a report signed and sworn to by the person or persons in interest, his or their duly authorized agent or officer, containing a true and complete statement showing the number of stores or mercantile establishments operated or maintained in this State in the preceding year; the name, location and street address of each such store or mercantile establishment; and such other information as the said Supervisor of Public Accounts may require.

Graded license tax.

Section 3. That the license tax for said business described in this Act levied upon the store or stores operated in the State of Louisiana shall be based on the number of stores or mercantile establishments included under the same general management, supervision, ownership or control, whether operated in this State or not, and shall be fixed and graded as follows, to-wit:

(1) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of not more than ten stores, the annual license shall be Ten ($10.00) Dollars for each such store operated in this State.

(2) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than ten stores, but not more than thirty-five stores, the annual license shall be Fifteen ($15.00) Dollars for each such store operated in this State.

(3) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than thirty-five stores but not more than fifty stores, the annual license shall be Twenty ($20.00) Dollars for each such store operated in this State.

(4) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than fifty stores but not more than seventy-five stores, the annual license shall be Twenty-five ($25.00) Dollars for each such store operated in this State.

(5) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than seventy-five stores but not more than one hundred stores, the annual license shall be Thirty ($30.00) Dollars for each such store operated in this State.

(6) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than one hundred stores but not more than one hundred twenty-five stores, the annual license shall be Fifty ($50.00) Dollars for each such store operated in this State.

(7) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than one hundred twenty-five stores but not more than one hundred fifty stores, the annual license shall be One Hundred ($100.00) Dollars for each such store operated in this State.

(8) Upon stores or mercantile establishments operated in this State and belonging to

a chain or group having a total of more than one hundred fifty stores but not more than one hundred seventy-five stores, the annual license shall b One Hundred Fifty ($150.00) Dollars for each such store operated in this State.

(9) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than one hundred seventy-five stores but not more than two hundred stores, the annual license shall be Two Hundred ($200.00) Dollars for each such store operated in this State.

(10) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than two hundred stores, but not more than two hundred twenty-five stores, the annual license shall be Two Hundred Fifty ($250.00) Dollars for each such store operated in this State.

(11) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than two hundred twenty-five stores but not more than two hundred fifty stores, the annual license shall be Three Hundred ($300.00) Dollars for each such store operated in this State.

(12) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than two hundred fifty stores but not more than two hundred seventy-five stores, the annual license shall be Three Hundred Fifty ($350.00) Dollars for each such store operated in this State.

(13) Upon stores or mercantile establishments operated in this State and belonging to

a chain or group having a total of more than two hundred seventy-five stores but not more than three hundred stores, the annual license shall be Four Hundred ($400.00) Dollars for each such store operated in this State.

(14) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than three hundred stores but not more than four hundred stores, the annual license shall be Four Hundred Fifty ($450.00) Dollars for each such store operated in this State.

(15) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than four hundred stores but not more than five hundred stores, the annual license shall be Five Hundred ($500.00) Dollars for each such store operated in this State.

(16) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of more than five hundred stores, the annual license shall be Five Hundred Fifty ($550.00) Dollars for each such store operated in this State.

License in addition to all other taxes.

Section 4. The license herein prescribed shall be in addition to ad valorem taxes and licenses prescribed in the general license laws of this State.

License taxes payable before March 1st to Supervisor of Public Accounts.

Section 5. That the license taxes under this Act shall be payable before the first day of March of each year to the Supervisor of Public Accounts for the State of Louisiana, who is hereby charged with the duty of collecting the said taxes, and if delinquent, such taxes shall bear interest at the rate of two per cent per month, plus ten per cent additional on both

principal and interest as attorney's fees in all cases wherein an attorney is called on to assist in the collection. A separate license shall be issued for each store operated or maintained by licensee, and it shall be the duty of licensee to post the license in a conspicuous place in each store.

Separate licenses.

Employment of private counsel.

That the Supervisor of Public Accounts, in order to enforce the collection of the aforesaid taxes is hereby authorized to employ private counsel to represent him in any proceeding under this Act.

Amounts collected to be prorated to various parishes.

Section 6. All taxes collected under the provisions of this Act shall be paid to the Supervisor of Public Accounts, and he shall distribute and apportion and pay such amounts so received by him in any fiscal year to the various parishes of the State of Louisiana wherein said stores are located, based pro rata upon the population of each parish as found and shown by the last United States census of the said State of Louisiana, and the said Parishes shall use the apportioned fund as follows, to-wit: first, for the liquidation of any outstanding road or school bonds, or other bonded indebtedness of said parish, which bonded indebtedness is paid by a tax levied on property; second, where there is no bonded indebtedness, as above stated, the aforesaid pro rated funds shall be applied to and used for the public schools of said parishes; provided, however, in the Parish of Orleans the same shall go to the General Fund.

Not to effect present laws.

Section 7. That the manner of collecting licenses under this Act and the enforcement thereof, the form of license receipt, and the manner of recording and filing affidavits shall be similar to that now provided, or may hereafter be provided, for the collection by the Tax Collector of other license taxes.

Penalty for violation.

Section 8. Any person, the member of any firm, the officer or manager of any corporation, violating any of the provisions of this Act, shall be guilty of a misdemeanor, and upon conviction in a court of competent jurisdiction, shall be punished by a fine of not more than Five Hundred Dollars nor less than Fifty Dollars, or by imprisonment of not more than ninety days nor less than sixty days in the parish jail, or both such fine and imprisonment, at the discretion of the court.

Exceptions.

Section 9. The provisions of this Act shall not apply to any person, firm, partnership, corporation, or association of persons, selling or distributing any commodity under a public utility franchise from the State of Louisiana or any parish, municipality or other political subdivision thereof, and selling only such goods, wares and merchandise, as may be used with the commodity distributed under such franchise.

Gasoline filling stations.

Section 10. That the provisions of this Act shall not apply to gasoline filling stations where the average daily stock of gasoline, motor oils or automobile accessories carried does not exceed Fifteen Hundred ($1,500.00) Dollars.

Constitutional provision.

Section 11. That in the event of any phrase, clause, or section of this Act is found to be unconstitutional for any reason, such unconstitutionality shall not have the effect of invalidating those other portions of this Act which may be found to be constitutional, but those other portions which are found to be constitutional shall continue to remain in force and effect.

Repealing clause.

Section 12. That all laws or parts of laws in conflict herewith be and the same are hereby repealed.

Approved by the Governor: July 7, 1932.

A true copy:

E. A. CONWAY,
Secretary of State.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE GREAT ATLANTIC & PACIFIC TEA COMPANY versus ALICE LEE GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS, ET AL.	No. 277 IN EQUITY (Filed July 24, 1936)

Before FOSTER AND HUTCHESON, Circuit Judges, and BORAH, District Judge:

BORAH, District Judge:

This controversy involves the validity of the chain store license statute of Louisiana. Complainant, an Arizona corporation which with its affiliates operates 106 stores in Louisiana and a total of 15,082 elsewhere in the United States and in Canada, initiated this proceeding by the filing of a class bill in which twelve other foreign corporations operating retail units in Louisiana intervened and became coplaintiffs, praying that the tax officials be enjoined from enforcing the Act. The complainants challenge the statute as violative of the due process and equal protection clauses of the Fourteenth Amendment, of the corresponding provisions of the Constitution of Louisiana, and of the commerce clause of the Federal Constitution. Upon the filing of the bill a temporary restraining order was issued after notice, restraining the enforcement of the statute against the complainants. The defendants agreed without prejudice to the ultimate rights of any party to the suit that it was proper for the matter involved

to be held in statu quo until a hearing could be held on the merits, and accordingly an order for an interlocutory injunction was issued by a specially constituted District Court upon the case made out by the affidavits of complainant and intervenors to the original and intervening bills. The case was in due course set down for hearing and the matter is now before the Court for disposition on the merits.

The statute here under review, Act 51 of the Louisiana Legislature of 1934, was enacted pursuant to the provisions of Section 8, Article 10 of the Constitution of Louisiana for the year 1921, authorizing the legislature of Louisiana to levy license taxes, and providing that such license tax may be classified. graduated or progressive.

Section 1 of the Act provides:

> "Be it enacted by the Legislature of Louisiana, That because of the advantages accruing from the operation of multiple stores wherever situated, and because of the basic difference inherent in such character of operations; there be and is hereby levied an annual license tax for the year 1935 and for each subsequent year upon each person, firm, partnership, corporation or association of persons engaged in the business of operating, or maintaining, as part of a group or chain, any store or stores in this State, where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail under the same general management, supervision, ownership or control, commonly known as branch or chain stores."

Section 3 of the Act provides:

> "That the license tax for said business described in this Act levied upon the store or stores

operated in the State of Louisiana shall be based on the number of stores or mercantile establishments included under the same general management, supervision, ownership or control, whether operated in this State or not, and shall be fixed and graded as follows, to-wit:

(1) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of not more than ten stores, the annual license shall be Ten ($10.00) Dollars for each such store operated in this State.

(2) Upon stores * * * having a total of more than ten stores, but not more than thirty-five stores, the annual license shall be Fifteen ($15.00) Dollars for each such store * * *.

(3) Upon stores * * * having a total of more than thirty-five stores, but not more than fifty stores, the annual license shall be Twenty ($20.00) Dollars for each such store * * *.

(4) Upon stores * * * having a total of more than fifty stores, but not more than seventy-five stores, the annual license shall be Twenty-five ($25.00) Dollars for each such store * * *.

(5) Upon stores * * * having a total of more than seventy-five stores, but not more than one hundred stores, the annual license shall be Thirty ($30.00) Dollars for each such store * * *.

(6) Upon stores * * * having a total of more than one hundred stores, but not more than one hundred twenty-five stores, the annual license shall be Fifty ($50.00) Dollars for each such store * * *.

(7) Upon stores * * * having a total of more than one hundred twenty-five stores, but not more than one hundred fifty stores, the annual license shall be One Hundred ($100.00) Dollars for each such store * * *.

(8) Upon stores * * * having a total of more than one hundred fifty stores, but not more than one hundred seventy-five stores, the annual license shall be One Hundred Fifty ($150.00) Dollars for each such store * * *.

(9) Upon stores * * * having a total of more than one hundred seventy-five stores, but not more than two hundred stores, the annual license shall be Two Hundred ($200.00) Dollars for each such store * * *.

(10) Upon stores * * * having a total of more than two hundred stores, but not more than two hundred twenty-five stores, the annual license shall be Two Hundred Fifty ($250.00) Dollars for each such store * * *.

(11) Upon stores * * * having a total of more than two hundred twenty-five stores, but not more than two hundred fifty stores, the annual license shall be Three Hundred ($300.00) Dollars for each such store * * *.

(12) Upon stores * * * having a total of more than two hundred fifty stores, but not more than two hundred seventy-five stores, the annual license shall be Three Hundred Fifty ($350.00) Dollars for each such store * * *.

(13) Upon stores * * * having a total of more than two hundred seventy-five stores, but not more than three hundred stores, the annual license shall be Four Hundred ($400.00) Dollars for each such store * * *.

(14) Upon stores * * * having a total of more than three hundred stores, but not more than four hundred stores, the annual license shall be Four hundred Fifty ($450.00) Dollars for each such store * * *.

(15) Upon stores * * * having a total of more than four hundred stores, but not more than

five hundred stores, the annual license shall be Five Hundred ($500.00) Dollars for each such store * * *.

(16) Upon stores * * * having a total of more than five hundred stores, the annual license shall be Five Hundred Fifty ($550.00) Dollars for each such store * * *.

The bill alleges, and it is admitted, that the complainant is engaged in the business of selling groceries, fruits, vegetables, poultry, meats, cheese, eggs and other foods, meats and dairy products or goods commonly sold in grocery and meat stores, and has been so engaged for more than ten years. It operates under the same general management, supervision, ownership or control 15,082 stores, of which 14,800 are located in the United States and 282 are located in Canada. Of this number, 62 stores are located in the City of New Orleans and 44 stores are located at points in Louisiana outside the city of New Orleans, and it has capital invested in the State of Louisiana approximating half a million dollars.

The bill alleges that prior to the enactment of the 1934 statute, the tax imposed by the State of Louisiana upon chain stores was that established by Act 19 of the Louisiana Legislature of 1932. The Act of 1932, like the chain store tax statute of every other state in which such tax exists, provided for a classification based only upon the number of stores operated in the State and established ten classes comprising units of five each, and an eleventh class comprising all stores in excess of fifty. The tax upon stores in the last class under said Act was $200.00 per store; stores falling within the lower classes

paying at lower rates according to number of stores in each class, the said rates ranging from $15.00 to $100.00 per store for stores less than fifty in number.

The bill charges that the purpose and effect of the 1934 statute was to reach operators of chains outside Louisiana so as to produce revenue for Louisiana by an extra-territorial tax and at the same time to discriminate in favor of local chains by reducing the rates applicable to a local chain and increasing the rates applicable to a foreign chain even though the local chain may operate far more extensively in the State than does the foreign chain. Thus H. G. Hill Stores, Incorporated, which is in direct competition with the complainant, The Great Atlantic & Pacific Tea Company, and operates in New Orleans more stores than does the complainant, is required under the Louisiana statute to pay for its eighty-seven stores $30.00 per store, whereas the complainant has only sixty-three stores in New Orleans but each of said stores is required to pay a tax of $550.00.

In addition to the facts averred in the bill the complainants offered evidence to prove the following points:

Operations of chains doing business in more than one state vary greatly from section to section and from state to state because of differences in local conditions, economic and otherwise, freight rates added to cost, remoteness from headquarters and executive management, increase in difficulty of supervision, local competition and other factors.

Conditions as to sales and profits vary greatly in all classes of stores according to the section of the country

in which they are located. In almost every case operations in Louisiana are less than average for all stores operated by the particular company.

In every important respect the operations of the complainant are the same as those of H. G. Hill Stores, Incorporated. The gross volume of the sales of the Hill Stores in New Orleans is very much greater; they have more stores and do more business per store than the stores of the Great Atlantic & Pacific Tea Company, and under the statute they pay $30.00 per store, while complainant is required to pay a maximum of $550.00 per store on every store.

Other corresponding differentials are set forth to show that one of the purposes and effects of the Louisiana statute is to discriminate in favor of a Company which operates in Louisiana a larger number of units than a competitor which operates a smaller number of units in Louisiana, but a larger total number in the world.

With reference to the situation in Louisiana as of date February 10, 1936, the proof shows that complainant operated 109 stores of which 66 were in New Orleans; other food chains operated 197 stores; independent grocers operating under one general supervision and pooling their purchases operated 128 stores; and entirely independent grocers operated 2820 stores. The census reports further show that the number of chain stores in Louisiana is decreasing at a more rapid rate than the number of independent stores, and that the number of wholesale stores in Louisiana is actually increasing.

The defendants produced evidence to prove that the retail units operated in Louisiana by complainant and intervenors are part of a chain or system; that all the units of a retail chain contribute to the central purchasing power of the chain irrespective of state lines and location of stores and increases the per unit multiple advantages enjoyed by the operator of the system; that the greater the number of units in the chain, the greater the purchasing power, the greater the secret rebates and allowances, the greater the advantages in advertising, the greater the capital employed, the greater the social and economic consequences, and the lower the cost of distribution and overhead.

Testimony was also offered similar to that found in the original chain store tax case, State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527; 51 S. Ct. 540, 75 L. Ed. 1248, 73 A. L. R. 1464, establishing the difference in the type of operation between the operator of one store and the operator of many stores, and the difference in the type of operation, varying with the number of units, with additional reference to the difference in the method of operation of the Great Atlantic & Pacific Tea Company as compared with the H. G. Hill Stores.

In fine the record in this case shows the contribution to the advantages made by each unit in the chain, and the per unit advantage made possible by the whole system, and in that respect only does it differ materially from the proof which was before the court in the Jackson case. Indeed the only question presented here over and above that which received the consideration of the Court in State Board of Tax Commissioners v. Jackson, supra; Louis K.

Liggett Company v. Lee, 288 U. S. 517, 53 S. Ct. 481; 77 L. Ed. 929, 85 A. L. R. 699 and Fox v. Standard Oil Company of New Jersey, 294 U. S. 87, 55 S. Ct. 333, 79 L. Ed. 780, is the method used by the Legislature of Louisiana in arriving at the rate of the tax per unit in Louisiana.

It is well settled under the authorities, supra, that there are differences and advantages in favor of large chains and for that reason the State may tax the large chains more heavily than the smaller ones, and upon a graduated basis. In the present case the State imposes a license or privilege tax, clearly within its authority, for the privilege of doing business in Louisiana. The measure of that tax is the number of units in the chain in the State. The rate is determined by the number of stores in the entire chain. No property beyond the jurisdiction of the State is in any just sense taxed under the statute. The rate only is affected by units of the chain outside of Louisiana and these units are considered only for the purpose of determining the type of business done in Louisiana and the value of the privilege of operating each unit in the State. Where as here the power to tax exists, the extent of the burden is a matter for the discretion of the legislature. The wisdom of its exercise is not the concern of this Court.

Complainants further contend that the Louisiana Statute does not represent any policy to protect, and was not designed to, and does not in fact protect independent merchants against chains, but establishes an arbitrary discrimination against chains operating in other States. "The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded

upon a reasonable distinction, American Sugar Rfg. Co. v. Louisiana, 179 U. S. 89, 21 S. Ct. 43, 45 L. Ed. 102, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman & Lewis Co., 240 U. S. 342; 36 S. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; Quong Wing v. Kirkendall, 223 U. S. 59, 32 S. Ct. 192, 56 L. Ed. 350" State Board of Tax Commission of Indiana v. Jackson, supra. The statute here assailed classifies chain stores in accordance with the economic advantages which they possess and gives recognition to the basic differences of their operations. It imposes a license tax for the privilege of operating retail units in multiple form reasonably adjusted in amount with regard to substantial differences in the value of the privilege exercised. The classification is neither arbitrary nor capricious. The statute treats upon a similar basis all owners of chain stores similarly situated. In the light of what we have said this is all that is required by the equal protection clauses of the Federal and State Constitutions.

What has been said in respect of the contention that the tax establishes an arbitrary discrimination against chains operating in other states is a sufficient answer to the contention that property has been taken without due process of law.

It is asserted on behalf of the intervenors, Montgomery Ward & Company, Incorporated, and Sears-Roebuck & Company that the tax is invalid (1) because it is levied for the privilege of operating stores conducting both intrastate and interstate business and the tax is not divisible in accordance with the respective amounts of intra-

state and interstate business transacted, (2) because it is levied for the privilege of carrying on Louisiana business and is partly measured by interstate operations carried on wholly outside the State of Louisiana. The claim does not merit serious consideration. The statute by its express terms applies only "where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail".

The order heretofore entered granting an interlocutory injunction is recalled, and the decree for injunction denied, and the bill of complaint dismissed. Appropriate orders may accordingly be entered.

SUPREME COURT OF THE UNITED STATES.

No. 652.—October Term, 1936.

The Great Atlantic & Pacific Tea Company, et al., Appellants, *vs.* Alice Lee Grosjean, Supervisor of Public Accounts, State of Louisiana, et al.	Appeal from the District Court of the United States for the Eastern District of Louisiana.

[May 17, 1937.]

Mr. Justice Roberts delivered the opinion of the Court.

This cause presents the questions whether the method prescribed by a chain store tax act for ascertaining the rate of taxation offends the Fourteenth Amendment and the commerce clause of the federal Constitution.

In 1932 the legislature of Louisiana adopted an act levying an occupation or license tax upon chain stores,[1] under which the exaction was fifteen dollars upon each of two or more stores, not in excess of five; upon each store in excess of five, but not exceeding ten, twenty-five dollars; and the amount increased in brackets for additional stores, the last bracket embracing stores in excess of fifty upon each of which the tax was two hundred dollars.

By Act 51 of 1934[2] the earlier law was amended to lay the tax on "persons, firms, partnerships, corporations or associations of persons engaged in the business of operating two or more stores or mercantile establishments, one or more of which is located in this State, . . . under the same general management, supervision, ownership or control . . .". Section 3 provides that the tax "shall be based on the number of stores or mercantile establishments included under the same general management, supervision, ownership or control, whether operated in this State or not, and shall be fixed and graded as follows to wit: (1) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of not more than ten stores, the

[1] No. 19 of 1932; Acts of Louisiana, 1932, p. 125.

[2] Acts of Louisiana 1934, p. 251.

annual license shall be Ten ($10.00) Dollars for each such store operated in this State." There are fifteen additional paragraphs progressively increasing the rate per store in Louisiana of larger chains, the last fixing the rate for a store belonging to a chain of more than five hundred at $550.

The Great Atlantic & Pacific Tea Company, an Arizona corporation, owning, operating or controlling 15,082 stores in the United States, Canada, and elsewhere, 106 of which are in Louisiana, filed its bill in the District Court to restrain the appellees, state officers, from enforcing the statute. Other corporations operating chains, some units of which are located in Louisiana, intervened as plaintiffs. A temporary restraining order issued, the appellees answered the bill, and the case was heard upon pleadings and proofs by a specially constituted court of three judges, which upheld the statute and dismissed the bill.[3]

The constitutional infirmity of the Act is said to consist in arbitrary discrimination in favor of local as against national chains, in the attempt to tax property and activities which are beyond the state's jurisdiction, and in burdening interstate commerce. We hold the legislation impregnable to attack on these grounds.

First. The exaction is an occupation or license tax. The subject is the conduct of a business within Louisiana. Without contravening the equal protection clause of the Fourteenth Amendment a state may separately classify for taxation the conduct of a chain store,[4] and may increase the rate in proportion to the increase in the number of stores within the state, since the opportunities and powers of a chain store operator become greater with the growth of the number of units maintained.[5] The appellants assert that in adjusting the rate for a chain store in Louisiana the legislature may not take into account the size of the chain to which the store belongs, by counting the total number of its units wherever located. So to do, it is claimed, is arbitrarily to discriminate against sectional or national chains in favor of intrastate chains.

The District Court found that the testimony offered by the State was similar to that in *Tax Commissioners* v. *Jackson, supra;* established the difference in type of operation between the operator of one store and the operator of many, and the variance in advantage

[3] 16 F. Supp. 499.

[4] *Tax Commissioners* v. *Jackson*, 283 U. S. 527; *Liggett Co.* v. *Lee*, 288 U. S. 517.

[5] *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 100.

and mode of operation with the number of units in the chain. In addition, the court found that all the stores of a retail chain contribute to the central purchasing power of the chain irrespective of state lines and location of stores, and increase the per unit multiple advantage enjoyed by the operator of the system; that the greater the number of units the greater the purchasing power of the chain, the greater the rebates and allowances, the greater the advantages in advertising, the greater the capital employed, the greater the social and economic consequences, and the lower the cost of distribution and overhead. "In fine, the record in this case shows the contribution to the advantages made by each unit in the chain, and the per unit advantage made possible by the whole system, and in that respect only does it differ materially from the proof which was before the court in the *Jackson* case." These findings are assigned as error, but they have substantial support in the record and we therefore accept them.

If the competitive advantages of a chain increase with the number of its component links, it is hard to see how these advantages cease at the state boundary. Under the findings a store belonging to a chain of one hundred, all located in Louisiana, has not the same competitive advantages as one of one hundred Louisiana stores belonging to a national chain of one thousand. The appellants lean heavily on the findings of the court respecting the relative business in New Orleans of the Great Atlantic and Pacific Company and the H. G. Hill Stores, Inc., a Louisiana corporation. The court found that the operations of the two are generally of the same character; the former conducts one hundred and six stores in the state, sixty-two of which are in the city of New Orleans; the latter ninety-two in the state, of which eighty-seven are in the city. Each concern conducts grocery and meat stores with substantially the same line of merchandise and their sales methods are practically the same. The gross volume of sales of Hill in New Orleans is much greater; it has more stores, and does more business per store in that city than the Atlantic and Pacific. The court further found, however, that the total purchasing power of the Atlantic and Pacific is much greater than that of Hill; that Atlantic and Pacific has field offices located at primary markets, which are in charge of specialists and supervised by central purchasing offices in New York, and maintains divisional warehouses throughout the country, whereas the opera-

tions of Hill are confined to Louisiana, and chiefly to New Orleans. Under the statute Hill is taxable at the rate of $30 per store as against $550 assessable against Atlantic and Pacific. These facts are said to demonstrate that the Act denies the appellant and other intervenors the equal protection of the laws by arbitrarily discriminating against national in favor of local chains. But the contention is answered not only by the specific finding respecting the difference between the two companies' methods but by the general finding that addition of units to a chain increases the competitive advantage of each store in the chain.

The court's findings are supported by evidence bearing upon a variety of advantages enjoyed by large chains which are unavailable to smaller chains. One striking illustration is furnished by the uncontradicted proof that the Atlantic and Pacific Company received, in the year 1934, from its vendors, secret rebates, allowances, and brokerage fees amounting to $8,105,000 which were demanded by the company as a condition of purchasing from the vendors in question. The leverage which accomplished this was the enormous purchasing power of the company. The amount thus obtained equals $530 for each of the Atlantic and Pacific Company's stores or nearly the amount of the tax exacted by the statute. The appellants insist that these facts are not significant because there is testimony that, in the drug trade, quantity discounts usually do not increase after a certain volume of purchases is reached, but the testimony does not specify the point where quantity discounts cease to grow. The record discloses what would be plain enough without evidence, that generally volume of purchasing power spells lower prices, special terms, and other advantages. It is unnecessary to discuss the evidence supporting the findings with respect to other facilities enjoyed only, or in increased measure, by the larger chains.

The appellants urge that the Act arbitrarily discriminates in favor of local chains because it is inconceivable that a chain operating wholly within the state would have five hundred stores, not to mention upwards of fifteen thousand, the number maintained by the Atlantic and Pacific. The argument is inconsistent with the finding that additional units, wherever situate, increase the advantages and economic effects of the chain as a whole and of each unit; and ignores the possibility that a chain-store company of national scope might well be incorporated in Louisiana, whose stores in that

state would be rated for taxation according to its total stores within and without the state.

Other instances of the working of the Act are cited to show that it arbitrarily discriminates against national chains and in favor of local ones solely because they are such. Thus, it is said, if a national chain owning 501 stores in other states, establishes a single store in a Louisiana city where there is a local chain of two or three like establishments, the national concern must pay a license of $550 for its one store while the stores of the local chain are taxed but $10 each. The appellees retort that since the earlier law imposed a tax of $15 on each store in the local chain and none upon the one Louisiana store of the national chain it was more vulnerable to the charge of arbitrariness than the Act under review. Whatever the pertinence of the reply, the facts found respecting the advantages of a larger chain as compared with a smaller justify as not unreasonable or arbitrary the imposition of a higher license tax on the units of the former which are maintained within the state. Even one unit of such a national chain located in Louisiana enjoys competitive advantages over the stores of the local proprietor consequent upon its relation to the far-flung activities and facilities of the chain.

The act under review is to be distinguished from the Florida statute considered in *Liggett Co.* v. *Lee, supra,* which increased the tax if the chain happened to have stores in two counties of the state rather than in one. The increase of rate was held arbitrary because it was unrelated to the size or character of the chain and was conditioned solely upon the location of one or more of its units. The Louisiana act adopts no such basis of classification. A small chain of three stores, one of which is in Louisiana and two in Mississippi, will pay exactly the same tax as a similar organization having the same number of stores all in Louisiana. A concern having ninety-two stores scattered over ten states, seven of which are in Louisiana, will pay exactly the same tax per Louisiana store as the H. G. Hill Stores, Inc., all of whose ninety-two stores are in Louisiana. Thus it appears that the classification is not based upon the location of the stores within or without the state but upon the type of business conducted, the scale of that business, its accompanying competitive advantages and economic results.

Finally, since the court below found that the sales and earnings of the individual stores of a chain differ in various portions of the country and those of the Louisiana stores have been below the average for all stores of many of the appellants, the claim is that the statute, by taking into account all units indiscriminately in fixing the rate, arbitrarily disregards the value of the local privilege for which the license fee is charged. We cannot say that classification of chains according to the number of units must be condemned because another method more nicely adjusted to represent the differences in earning power of the individual stores might have been chosen, for the legislature is not required to make meticulous adjustments in an effort to avoid incidental hardships.[6] It is enough that the classification has reasonable relation to the differences in the practices of small and large chains. The statute bears equally upon all who fall into the same class, and this satisfies the guaranty of equal protection.[7]

Second. The appellants contend the Act deprives them of property without due process of law because the tax is imposed, at least in part, upon things which are beyond the jurisdiction of Louisiana. The state may not tax real property or tangible personal property lying outside her borders;[8] nor may she lay an excise or privilege tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed.[9] But, as we have seen, the subject of the tax in question is the prosecution of a defined business activity within the State of Louisiana,—the conduct of a retail store which is a part of a chain under a single management, ownership or control,—a legitimate subject of a license or occupation tax. The measure of the exaction is the number of units of the chain within the state,—a measure sanctioned by our decisions. The rate of tax for each such unit is fixed by reference to the size of the entire chain. In legal contemplation the state does not lay a tax upon property lying

[6] Compare *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78; *Chesapeake & Ohio Ry.* v. *Conley*, 230 U. S. 513, 522; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 371; *Fox* v. *Standard Oil Co.*, *supra*, 101, 102.

[7] *Tax Commissioners* v. *Jackson*, *supra*, p. 542; *Fox* v. *Standard Oil Co.*, *supra*, 101.

[8] *Louisville & c. Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Delaware L. & W. R. Co.* v. *Pennsylvania*, 198 U. S. 341; *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194.

[9] *Frick* v. *Pennsylvania*, 268 U. S. 473.

beyond her borders nor does she tax any privilege exercised and enjoyed by the taxpayer in other states. The law rates the privilege enjoyed in Louisiana according to the nature and extent of that privilege in the light of the advantages, the capacity, and the competitive ability of the chain's stores in Louisiana considered not by themselves, as if they constituted the whole organization, but in their setting as integral parts of a much larger organization. We cannot hold that this privilege is unaffected by the status of the Louisiana stores as members of such a chain or that recognition of the advantages and capacities enjoyed by them as a result of that membership is forbidden in classifying them for progressive increase of rate. Such classification is not in legal effect the taxation of property or privileges possessed or enjoyed by the taxpayer beyond the borders of the state.

Maxwell v. *Bugbee*, 250 U. S. 525, goes far to sustain the validity of the Act.[10] The exaction in the present case is even less open to the accusation of extra-territoriality than the one there under consideration, because here it cannot be claimed, as it was there, that not alone the rate, but to some extent, the measure of the tax, is affected by the enjoyment of extra-state privileges.

Our decision need not, however, rest on conceptions of subject, measure and rate of tax. Much broader considerations touching the state's internal policy of police sustain the exaction. The tax is laid solely upon intrastate commerce.[11] In the exercise of its police power the state may forbid, as inimical to the public welfare, the prosecution of a particular type of business,[12] or regulate a business in such manner as to abate evils deemed to arise from its pursuit.[13] Whatever a state may forbid or regulate it may permit upon condition that a fee be paid in return for the privilege,[14] and such a fee may be exacted to discourage the prosecution of a

[10] See the comment on *Maxwell* v. *Bugbee* in *Frick* v. *Pennsylvania*, 268 U. S. at p. 495.

[11] *Nathan* v. *Louisiana*, 8 How. 73, 80-81; *East* v. *Van Deman & Lewis*, 240 U. S. 342, 360.

[12] *License Cases*, 5 How. 504; *Mugler* v. *Kansas*, 123 U. S. 623, 662-663; *Williams* v. *Arkansas*, 217 U. S. 79; *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 162.

[13] *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S. 251; *Engel* v. *O'Malley*, 219 U. S. 128, 137.

[14] *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365, 373, 374-376.

business or to adjust competitive or economic inequalities.[15] Taxation may be made the implement of the exercise of the state's police power;[16] and proper and reasonable discrimination between classes to promote fair competitive conditions and to equalize economic advantages is therefore lawful.[17]

If, in the interest of the people of the state, the legislature deemed it necessary either to mitigate evils of competition as between single stores and chains or to neutralize disadvantages of small chains in their competition with larger ones, or to discourage merchandising within the state by chains grown so large as to become a menace to the general welfare, it was at liberty to regulate the matter directly or to resort to the type of taxation evidenced by the Act of 1934 as a means of regulation. The appellants, by incorporating in some other state, or by spreading their business and activities over other states, cannot set at naught the public policy of Louisiana. The claim is, essentially, that even if local evils flow from the appellant's methods the state cannot control those evils because its power is limited to conditions created by the members of the chain found within the state. The conclusion is that the state must treat these stores as if they were something different from what they really are, since to do otherwise would be to reach beyond the borders of Louisiana for the measure of the tax. The argument answers itself. The policy Louisiana is free to adopt with respect to the business activities of her own citizens she may apply to the citizens of other states who conduct the same business within her borders, and this irrespective of whether the evils requiring regulation arise solely from operations in Louisiana

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[15] *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 92-95; *Reymann Brewing Co.* v. *Brister*, 179 U. S. 445, 453; *Williams* v. *Fears*, 179 U. S. 270, 276; *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 469; *McCray* v. *United States*, 195 U. S. 27, 60; *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563, 573; *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 62; *Brazee* v. *Michigan*, 241 U. S. 340, 342; *Alaska Fish Co.* v. *Smith*, 255 U. S. 44; *Liberty Warehouse Company* v. *Tobacco Growers Assn.*, 276 U. S. 71, 96; *Sproles* v. *Binford*, 286 U. S. 374, 394; *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 43, 44; *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 100; *Sonzinsky* v. *United States*, No. 614, October Term, 1936.

[16] *Gundling* v. *Chicago*, 177 U. S. 183, 188, 189; *East* v. *Van Deman & Lewis*, *supra*, 368; *Compania General* v. *Collector*, 275 U. S. 87, 95, 96; *Sonzinsky* v. *United States*, *supra*.

[17] *Bradley* v. *Richmond*, 227 U. S. 477, 480, 484; *Hammond Packing Co.* v. *Montana*, 233 U. S. 331, 333-334; *East* v. *Van Deman & Lewis*, *supra*, p. 368; *Tanner* v. *Little*, 240 U. S. 369, 382-383; *St. Louis Poster Advertising Co.* v. *St. Louis*, 249 U. S. 269, 274.

or are in part the result of extra-state transactions. It is not a denial of due process to adjust such license taxes as are here involved to meet the local evil resulting from business practices and superior economic power even though those advantages and that power are largely due to the fact that the taxpayer does business not only in Louisiana but in other states.

Third. Montgomery Ward & Company, one of the appellants, filed a bill of intervention. In addition to the objections already considered it contends that, as applied to its business, the act of 1934 constitutes an interference with and a regulation of interstate commerce forbidden by Art. I, Sec. 8 of the Constitution. The allegation is that this appellant owns and operates five stores in Louisiana and four hundred and eighty-six others spread over forty-five states; owns and operates nine mail order houses located in states other than Louisiana and nineteen so-called order stations located at various points outside Louisiana, the mail order houses and order stations all being exclusively engaged in interstate commerce. The order stations are installed in rented spaces with one regular employe at each and with a stock of samples, the only business transacted in them being the taking of orders which are transmitted to, and filled by, the mail order houses. With respect to the operation of the act the bill states: "Intervenor alleges that while the present administrative interpretation of said Act 51 of the Louisiana legislature of 1934 apparently limits the operation of said act to the intervenor's retail stores, the words 'mercantile establishments' used in said Act apparently include the aforesaid mail order houses and order stations owned and operated by the intervenor. Said Act does not by its terms exclude from its operation said establishments engaged in interstate commerce and, therefore, violates the Commerce Clause of the United States Constitution." . . .

The trial court found the facts as follows:

"Montgomery, Ward & Company, an Illinois corporation, operates 9 mail order establishments engaged in filling orders received from points in the United States and foreign countries through the mail. None of these mail order establishments are situated in Louisiana. The Company also has 19 mail order offices, none of which are situated in Louisiana; 17 Class A department stores carrying a complete line of general merchandise, none of which are situated in Louisiana; 456 Class B retail stores of limited size and carrying a limited line of merchandise, of which 5 are lo-

cated in Louisiana; and 16 Class C stores devoted exclusively to the sale of hardware, household appliances, automobile tires and tubes, of which none are located in Louisiana. The 5 Louisiana Class B stores take orders to be filled by mail from the Company's mail order establishment located at Fort Worth, in addition to selling merchandise at retail at its place of business to the public."

As a conclusion of law the court held "The claim [of the intervenor] does not merit serious consideration. The statute by its express terms applies only 'where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail.'"

Error is assigned to the District Court's conclusion and the appellant insists that the statute is bad because it imposes a single and indivisible tax for the privilege of conducting a business both interstate and intrastate, partly measured by interstate operations wholly extrastate.

As respects the regulation of interstate commerce the intervenor's bill is premature and without equity. The statute was approved July 12, 1934, and became effective for the calendar year 1935 and subsequent years. February 27, 1935, both the bill of the Great Atlantic & Pacific Tea Company and Montgomery Ward & Company's intervening bill were filed. The record discloses no rules or regulations promulgated by the appellee Supervisor of Public Accounts and no ruling by any responsible state official as to which of Montgomery Ward & Company's establishments are to be included in reckoning the total of its retail stores. For all that appears neither its mail order houses, nor its order stations, nor its department stores, will be included in the computation.

It is manifest that Montgomery Ward & Company cannot upon mere supposition that the Act will be unconstitutionally construed and applied in respect of its five stores in Louisiana obtain an advisory decree that the Act must not be so administered as to burden or regulate interstate commerce.[18]

The judgment of the District Court is

Affirmed.

Mr. Justice VAN DEVANTER and Mr. Justice STONE took no part in the consideration or decision of this case.

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[18] Compare *Hodge Co.* v. *Cincinnati*, 284 U. S. 335, 338; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 369; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324.

SUPREME COURT OF THE UNITED STATES.

No. 652.—October Term, 1936.

The Great Atlantic & Pacific Tea Company et al., Appellants, *vs.* Alice Lee Grosjean, Supervisor of Public Accounts, State of Louisiana, et al.	Appeal from the District Court of the United States for the Eastern District of Louisiana.

[May 17, 1937.]

Mr. Justice Sutherland, dissenting.

Mr. Justice McReynolds, Mr. Justice Butler and I are of opinion that the statute here involved is invalid as constituting a denial of the equal protection of the laws and an attempted exertion of the legislative power of the state with respect to properties and businesses located beyond its territorial borders.

In *Tax Commissioners* v. *Jackson*, 283 U. S. 527, this court sustained the validity of an Indiana statute imposing a chain-store tax graduated according to the number of stores under the same general management. But there, the amount of the tax in respect of each store was graduated according to the whole number of stores *within the state*. Here, the amount of the tax is not limited by the number of stores operated within the state, but is increased by including stores operated in other states and foreign countries. If, for example, the owner of a single store in Louisiana has fewer than ten stores outside the state, he pays a tax of $10; but if he operates as many as ten stores in other states or in Canada, he is required to pay upon his store in Louisiana $15 annually. And as the stores outside the state further increase in number, the tax upon the single store in Louisiana rises by successive steps until it reaches, in the highest bracket, where the stores outside exceed 500 in number, the sum of $550 upon the single Louisiana store.

We thought the classification in the *Jackson* case, although confined to stores within the state, was so arbitrary as to render the tax invalid under the equal protection clause of the Fourteenth

Amendment, and, together with Mr. Justice VAN DEVANTER, who takes no part in this case, set forth our views at length in a dissenting opinion. 283 U. S. 543 *et seq.* We rest upon what was there said, without repeating it, not for the purpose of again challenging the decision in the *Jackson* case, but because what we said applies more plainly to the variant facts of the case now under consideration. We thought then that the *Jackson* case was wrongly decided, but, accepting it as authoritative, it seems to us certain that it goes to the extreme verge of the law, and, for the reasons given in our dissenting opinion, equally certain that the present decision goes far beyond the verge. We add a few words in support of that view.

The Indiana law effected a discrimination between two classes—namely, operators of chain stores and operators of independent stores within the boundaries of the state, without reference to any stores outside. The Louisiana law effects a discrimination between two members of the same class — namely, chain-store operators within the state, where the only difference between them is that one also operates stores in other states and in Canada, while the other does not. Thus, for illustration, if A operates eleven stores in Louisiana, doing a business of $10,000,000 per year, and has none outside, he pays $15 for each store, or a total of $165, while if B operates eleven stores in Louisiana, and happens to have 490 stores distributed among the remaining 47 states of the Union and foreign countries, doing a total business of $5,000,000 per year, he is compelled to pay $550 upon each of his eleven stores, or a total of $6,050 —36 times the amount of the tax paid by A. This enormous difference is based upon a state of affairs wholly external to the State of Louisiana, the effect of which upon the Louisiana business is a matter of bald conjecture, varying widely, as it must, with the localities in which the foreign stores are to be found and the local circumstances by which their operations are affected.

Moreover, if the Louisiana statute be valid, other states in the Union may pass similar acts; and it is not improbable that they will. And if they do so, a remarkable situation will be brought about. Let us suppose, for example, that ten additional states, ranging from Maine to California, adopt the Louisiana form of legislation. In each of the states, including Louisiana, a given operator has ten stores, making 110 in all. In that case he will pay in each state a tax based not upon the operation of ten stores, but on the operation of 110. Instead, therefore, of paying in each state

$100 upon the basis of $10 for each of the ten stores, he will pay $500 upon the basis of $50 for each of the ten stores. If he should then put into operation sixteen additional stores, let us say in Canada or Norway, he would immediately bring himself into the bracket where the tax upon each store is fixed at $100—thus increasing his total taxation in the eleven states from $5,500 to $11,000, in virtue of these comparatively small operations in a foreign country, the effect of which, if any, in respect of competitive advantages in any one of the eleven states could hardly be described otherwise than as purely speculative.

The exaction here involved is not a tax upon Louisiana property or business, but is essentially a penalty imposed upon an operator of business wholly beyond the reach of the law of that state. We are not able to concede that it lies within the province of one state to thus indirectly penalize a method of doing business in another state, which it may be the policy of the latter to permit or, indeed, encourage. Compare *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511, 521-524. The foregoing illustrations, and others which might be supplied, in our opinion expose the arbitrary character of the classification and the consequent invalidity of the exaction imposed in virtue of it.

The sole fact that a Louisiana operator has opened additional stores in other states or in Canada or Norway, affords, we think, no valid basis for imposing upon him an enormously-increased tax from which his competitors, similarly circumstanced in all other respects, are exempt. The claim that thereby the balance of competitive advantage has been disturbed, is so fanciful as to furnish no basis for such legislation grounded in any policy or object of state taxation. The court below thought that to consider the number of stores outside the state was competent for the purpose of determining the value of the privilege of operating each store within the state. But the fallacy of that view as applied to the present case is demonstrated by the facts as found by that court—namely, that operations of chain stores "vary greatly from section to section and from state to state because of differences in local conditions, economic and otherwise, freight rates added to cost, remoteness from headquarters and executive management, increase in difficulty of supervision, local competition and other factors.

Conditions as to sales and profits vary greatly in all classes of stores according to the section of the country in which they are located." An attempt to fix the extent of the competitive advantage which will inure in favor of a business in Louisiana or the value of the privilege of operating it upon a basis so shifting and uncertain, seems to us an utterly futile undertaking. It is nothing more than an effort to reach a conclusion upon an assumed major premise, where the minor premise is unknown.

In *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, this court held invalid a state act imposing a graduated tax measured by the amount of gross sales. We held that it could not be sustained as an excise on the privilege of merchandising, because there was no reasonable relation between the amount of the tax and the value of the privilege, and no such relation between gross sales and net profits as would justify the classification. The tax was denounced (p. 557) as being "whimsical and arbitrary, as much so as would be a tax on tangible personal property, say cattle, stepped up in rate on each additional animal owned by the taxpayer, or a tax on land similarly graduated according to the number of parcels owned." We said (pp. 558-559) "that the gross sales of a merchant do not bear a constant relation to his net profits; that net profits vary from year to year in the same enterprise; that diverse kinds of merchandise yield differing ratios of profit; and that gross and net profits vary with the character of the business as well as its volume." It appeared from the testimony that great variations existed within each class selected for comparison; that in some classes, representing a greater amount of sales, there was a smaller net profit than in others having less aggregate sales. To the contention that the tax was a rough and ready method of taxing gains, less complicated and more convenient of administration than an income tax, we answered (p. 560), "The argument is in essence that it is difficult to be just, and easy to be arbitrary. If the Commonwealth desires to tax incomes it must take the trouble equitably to distribute the burden of the impost."

These observations apply to the case in hand; for although the taxes imposed by the statutes involved are different, the vices are the same.